

CONSTITUTIONAL LAW AND ITS ADMINISTRATION

By

SAMUEL P. WEAVER, Litt. D., LL. D.

OF THE BAR OF THE UNITED STATES SUPREME COURT

PROFESSOR OF CONSTITUTIONAL LAW
GONZAGA UNIVERSITY

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FOREWORD

This book is presented to colleges, universities and law schools, and to members of the bar, as a treatise on constitutional law and its administration. After many years' experience as a practicing lawyer and as a teacher of both the text and case systems of instruction, the author has become convinced that the use of a text in the study of constitutional law has a definite place in our educational system. The quantity of statute and case law on this subject has become so great that to adequately cover the entire field through leading cases supplemented by excerpts from cases, and by notes and annotations usually included, would require a work of several volumes, and would require more time than most schools could devote to the course. This treatise has been prepared, therefore, to supply a modern text for schools not using the case book system; to supplement the study of the many case books now being published, and generally to furnish a handbook for lawyers and others desiring a better understanding of our Constitution and its application to present day conditions.

American Constitutional Law includes the Fundamental Law of 1787; the twenty-one amendments; statutes implementing this law; decisions of the courts interpreting and construing it; and the established customs and usages of the Federal government, as well as certain inherent powers. Each of these subjects has been discussed briefly and concisely. Pre-constitution development has been made more articulate; and the evolution of the Fundamental Law of 1787 into an "Enlarged Constitution" has been set forth as a logical development. To preserve for the student the principles as announced in the decisions of the courts and in the statutes, in the form and language of the courts or of Congress, the author has used many quotations from opinions and from statutes. The chief aim of the author in designing the scope and contents of the text has been to cover the entire field of constitutional law as thoroughly and as completely as possible without requiring the student to expend too much time and effort in examining codes and

statutes and the written opinions of the courts, which, many times, are abstruse and difficult for the student to comprehend.

Appropriate emphasis has been placed upon the recognition of new powers and the development of new doctrines in recent years. This progress has included the overruling of precedents upon the subject of taxation, and precedents defining many of the limitations and guarantees of individual rights; the expansion of the war powers of the President; the increase of the powers of the Chief Executive; the enlargement of the economic powers of the Federal government; the creation of many new boards and commissions, resulting in what may be classified as the administrative department of the government; and the neoteric doctrine of inherent powers of the Federal government in external and foreign affairs. Every effort, consistent with what has seemed to be sound reasoning, has been made to dovetail these, as well as other details of a new federalism into long established principles, and to record them as fully and as accurately as possible as an integral part of our constitutional structure. This undertaking has been one of great delicacy, since this new philosophy of government, although having been in the process of development for several decades, has become only recently a dominant force in our national life.

The author desires to express his indebtedness to Robert A. Maurer, Professor of Constitutional Law at Georgetown University, and the author of Maurer's Cases on Constitutional Law, for reading the manuscript and for his many constructive suggestions. The role of Professor Maurer has been that of a friendly critic, and he is in no way chargeable with the form and contents of the text or with any errors or omissions which may appear, or with any constitutional theories that may have been suggested. These are the responsibility of the author exclusively. The author also desires to express his appreciation to his students at Gonzaga University for the deep interest they manifested in the study of constitutional law throughout the years that this manuscript was used as a text.

SAMUEL P. WEAVER

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Constitution 1787

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. ¹* The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

² No Person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

³ Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, *which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years,*¹ and excluding Indians not taxed, *three fifths of all other Persons.*² The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten

* Numbers preceding paragraphs denote clauses, marking subdivisions of sections. These numbers do not appear in the original copy of the Constitution.

¹ Altered by Fourteenth Amendment. See *Elk v. Wilkins*, 112 U. S. 102, 28 L. ed. 643.

² Abrogated by Fourteenth Amendment. See *McPherson v. Blacker*, 146 U. S. 39, 36 L. ed. 869.

Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and *until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six; New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*³

⁴ When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

⁵ The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. ¹ (*The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.*)⁴

² Immediately after they shall be assembled in consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; (*and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*)⁵

³ No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

⁴ The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

⁵ The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

⁶ The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.

³ Temporary provision.

⁴ Modified by Seventeenth Amendment.

⁵ Modified by Seventeenth Amendment.

When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

⁷ Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. ¹ The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

² (*The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.*) ⁶

SECTION. 5. ¹ Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

² Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

³ Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

⁴ Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. ¹ The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any

⁶ Superseded by Twentieth Amendment.

Speech or Debate in either House, they shall not be questioned in any other Place.

² No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. ¹ All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

² Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

³ Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. ¹ The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

² To borrow Money on the credit of the United States;

³ To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;⁷

⁴ To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

⁵ To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

⁶ To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

⁷ To establish Post Offices and post Roads;

⁸ To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

⁹ To constitute Tribunals inferior to the supreme Court;

¹⁰ To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

¹¹ To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

¹² To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

¹³ To provide and maintain a Navy;

¹⁴ To make Rules for the Government and Regulation of the land and naval Forces;

¹⁵ To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

¹⁶ To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

¹⁷ To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erec-

⁷ Modified by Twenty-first Amendment as to transportation of intoxicating liquor. See *Ziffirin v. Reeves*, 308 U. S. 132, 84 L. ed. 128; *Indianapolis Brewing Co. v. Liquor Control Commission of Michigan*, 305 U. S. 391, 83 L. ed. 243; *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38; *Dunn v. United States* (C. C. A.) 98 F. (2d) 119, 117 A. L. R. 1302.

tion of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

¹⁸ To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. ¹ *The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.*⁸

² The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

³ No Bill of Attainder or ex post facto Law shall be passed.

⁴ No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

⁵ No Tax or Duty shall be laid on Articles exported from any State.

⁶ No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

⁷ No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

⁸ No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. ¹ No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver

⁸ Temporary provision. See *Norris v. Boston* (Justice McKinley), 7 How. (48 U. S.) 454, 12 L. ed. 702, 773; *Dred Scott v. Sandford* (Justice Taney), 19 How. (60 U. S.) 411, 15 L. ed. 691.

Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

² No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

³ No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. ¹ The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

² Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

³ *(The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall*

*immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.)*⁹

⁴ The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

⁵ No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

⁶ In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

⁷ The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

⁸ Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. ¹ The President shall be Commander in Chief of

⁹ Superseded by Twelfth Amendment.

the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

² He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers*and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

³ The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their

Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. ¹ The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—*between a State and Citizens of another State*; ¹⁰—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

² In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

³ *The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.* ¹¹

SECTION. 3. ¹ Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

² The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe

¹⁰ Abrogated by Eleventh Amendment. See *Chisolm v. Georgia*, 2 Dall. (2 U. S.) 419, 1 L. ed. 440.

¹¹ Amplified by Sixth Amendment. See *Callan v. Wilson*, 127 U. S. 550, 32 L. ed. 223.

the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. ¹ *The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*¹²

² A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

³ *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*¹³

SECTION. 3. ¹ New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

² The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part

¹² Modified by Thirteenth Amendment. See *Dred Scott v. Sandford*, 19 How. (60 U. S.) 403, 15 L. ed. 691. Extended by Fourteenth Amendment.

¹³ Superseded by Thirteenth Amendment in so far as it appertained to slaves. See *State v. Joseph*, 137 La. 52, 68 So. 211; *Selective Service Cases*, 245 U. S. 366, 62 L. ed. 349, L. R. A. 1918 C 361.

of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; *Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article;*¹⁴ and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

¹ *All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.*¹⁵

² This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

³ The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Coventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,¹⁶

¹⁴ Temporary clause.

¹⁵ Extended by Fourteenth Amendment.

¹⁶ Signed by Go. Washington, Presidt. and deputy from Virginia, and attested by William Jackson, Secretary. Signed also by: John Langdon and Nicholas Gilman for New Hampshire; Nathaniel Gorham and Rufus King for Massachusetts; Wm. Saml. Johnson and Roger Sherman for Connecticut; Alexander Hamilton for New York; Wil. Livingston, David

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE
CONSTITUTION (1787), PROPOSED BY CONGRESS, AND
RATIFIED BY THE SEVERAL STATES, PURSUANT TO
ARTICLE V.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Brearely, Wm. Paterson and Jona. Dayton for New Jersey; B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. FitzSimons, Jared Ingersoll, James Wilson and Gouv Morris for Pennsylvania; Geo. Read, Gunning Bedford jun, John Dickinson, Richard Bassett and Jaco. Broom for Delaware; James McHenry, Dan of St. Thos. Jenifer and Danl. Carroll for Maryland; John Blair and James Madison Jr. for Virginia. Wm. Blount, Richd. Dobbs Spaight and Hu Williamson for North Carolina; J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney and Pierce Butler for South Carolina; and William Few and Abr. Baldwin for Georgia.

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.¹⁷

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

¹⁷ The first ten amendments were adopted by eleven states, and seem to have been in force from November 3, 1791, the date of their adoption by the State of Vermont.

AMENDMENT XI.¹⁸

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII.¹⁹

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the *fourth day of March* ²⁰ next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest num-

¹⁸ Promulgated January 8, 1798. See Chap. V, § 38, *infra*.

¹⁹ Promulgated September 25, 1804.

²⁰ Superseded by Twentieth Amendment.

bers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.²¹

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.²²

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

²¹ Promulgated December 18, 1865.

²² Promulgated July 28, 1868.

State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.²³

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.²⁴

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII.²⁵

1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs

²³ Promulgated March 30, 1870.

²⁴ Promulgated February 25, 1913.

²⁵ Promulgated May 31, 1913.

of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII.²⁶

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.²⁷

AMENDMENT XIX.²⁸

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.²⁹

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

²⁶ Promulgated January 29, 1919.

²⁷ Repealed by Twenty-first Amendment December 5, 1933. See *Dillon v. Gloss*, 256 U. S. 368, 65 L. ed. 994; *United States v. Chambers*, 291 U. S. 217, 78 L. ed. 763; *Tramp v. United States*, 86 F. (2d) 82.

²⁸ Promulgated August 26, 1920.

²⁹ Promulgated December 5, 1933.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

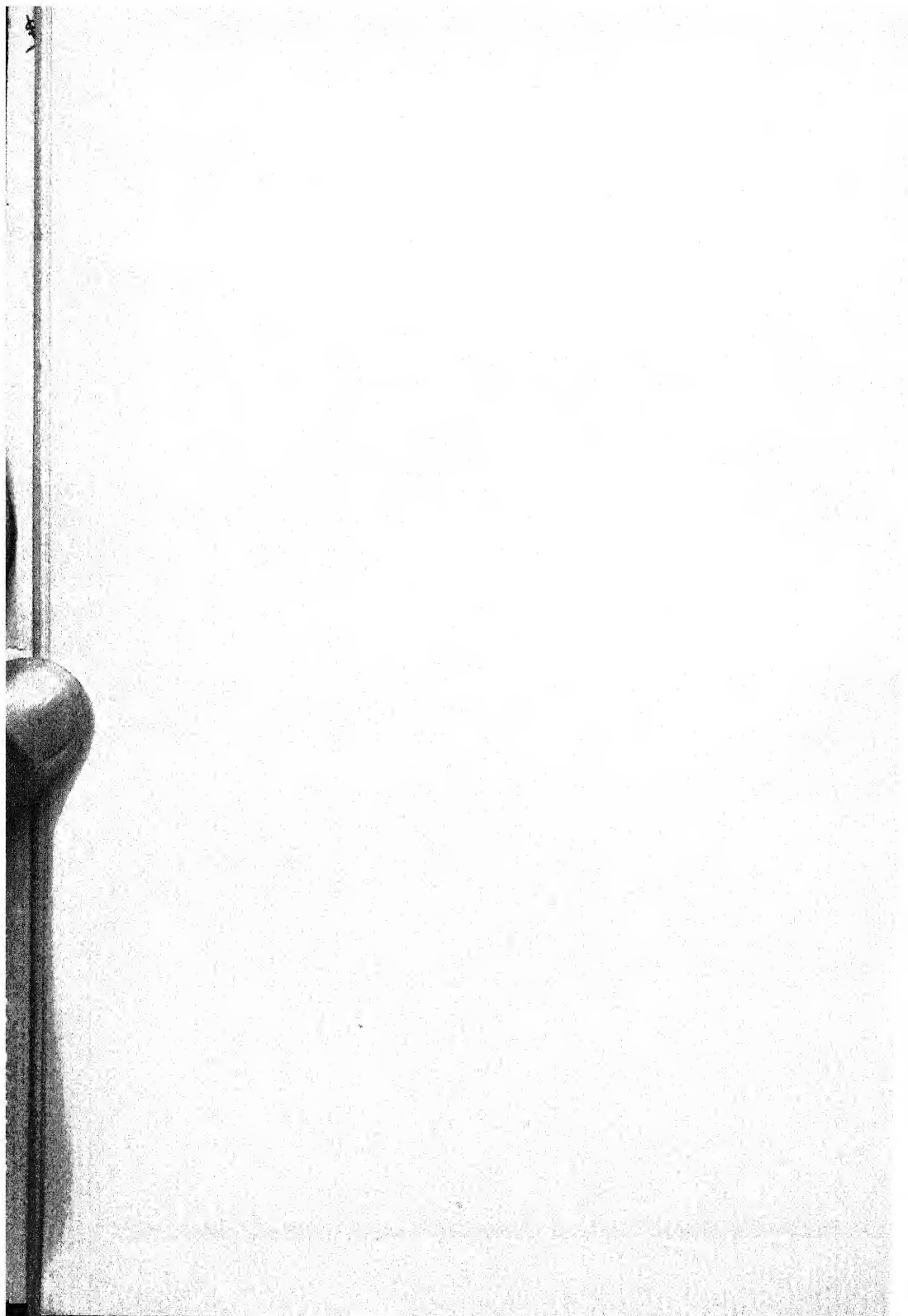
AMENDMENT XXI.³⁰

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

³⁰ Promulgated December 5, 1933. As to effect of its adoption see *Tramp v. United States* (C. C. A.) 86 F. (2d) 82; *United States v. Zager*, 14 F. Supp. 23, aff'd *Zager v. United States* (C. C. A.) 84 F. (2d) 1023, certiorari denied 299 U. S. 558, 81 L. ed. 411.



CONSTITUTIONAL LAW AND ITS ADMINISTRATION

PART I INTRODUCTION

CHAPTER 1 DEFINITIONS AND GENERAL PRINCIPLES

The Constitution was written to be understood by the people; its words and phrases were used in their normal and ordinary, as distinguished from technical, meaning.

—Justice Roberts

§ 1. **Constitution Defined.** A constitution is the fundamental organic law by which a state or nation is governed. In its most general sense it may be said to establish the essential foundation and the general framework of government and to provide the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised. "It is those rules or laws," according to Bryce, "which determine the form of the government and the respective rights and duties of the government toward the citizens and of the citizens toward the government. These rules or the more important among them may be contained in one document—or may be scattered through a multitude of statutes and reports of decisions."¹ In this comprehensive sense a constitution

¹ Bryce, *American Commonwealth* (New & Rev. Ed. 1920) 360.

may be either written or unwritten, and is applicable to any established government.

In America the term has been used generally in the more restricted sense. In our constitutional law a constitution has generally referred to a written instrument by which the fundamental powers of government were established, limited and defined, and by which these powers have been distributed among the several departments, this instrument being the formal document adopted by the Constitutional Convention on September 17, 1787.² The term has also been used in the more comprehensive sense, as defining our complete governmental structure and consisting of the Fundamental Law of 1787, of statutes implementing the Constitution, of decisions interpreting the Constitution, and of conventions and usages of the Federal government.

§ 2. Nature and Purpose of Constitutions. The nature of a constitution is determined by the objects it is designed to accomplish. These are (a) to establish permanently the basis of a governmental system, and (b) to provide for the public welfare through an undefined and expanding future.

A constitution is essentially limited to the establishment of the basic foundation and the general framework of government and the most general rules for its operation. It comprises and enunciates general principles which are intended to apply to all new facts and conditions which may come into being.³ A written constitution unavoidably deals in general language. It cannot provide for minute specifications of power or declare the means by which such power shall be carried into execution.⁴ It cannot embody an accurate detail of all of the subdivisions of which its great powers would admit. Its nature requires that only its rugged outlines should be marked and its important objects designated, leaving the details to be supplied by constitutional statutes, decisions, conventions, customs and usages.⁵

The term "constitution" implies an instrument of a permanent nature. It is one intended to endure through a long lapse of ages,

² Rasmussen v. Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773; State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

³ Johnson v. Grand Forks County, 22 N. D. 613, 135 N. W. 179, 125 Am. St. Rep. 662.

⁴ Martin v. Hunters, 1 Wheat. 304, 4 L. ed. 97.

⁵ Legal Tender Cases, 110 U. S. 421, 28 L. ed. 204; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

to meet changes and modifications of power; to grow and expand as the nation requires; and to be construed to meet all new facts and conditions arising from time to time. Chief Justice Marshall had in mind such permanency when he said that "A constitution is framed for ages to come, and is designed to approach immortality as near as human institutions can approach it."⁶

A constitution should be distinguished from a statute. A constitution is a fundamental law while a statute is an ordinary law. A constitution is a primary enactment while a statute is secondary. A constitution is an act of extraordinary legislation direct from the people acting in their sovereign capacity in relation to the structure of government, the extent and distribution of its powers, and the modes and principles of its operation, preceding ordinary laws in the point of time and embracing the settled policy of the nation. A statute on the other hand is legislation from the representatives of the people, or in the case of an initiative or a referendum, the people acting in their own legislative capacity, subject to the superior authority, which is the constitution. Statutes are enactments or rules for the government of civil conduct, or for the administration or the defense of the government. They are tentative, occasional, and in the nature of temporary expedients.⁷

The term "constitutional statute" is used frequently. This term refers to statutes of a more permanent nature adopted by Congress to complete the constitutional structure of our government, and which were necessary to make the Constitution of 1787 self-executing.⁸

§ 3. Constitutional Law Defined. Constitutional law treats of the establishment, construction and interpretation of constitutions. It deals with the nature and organization of government, its sovereign powers and their distribution and mode of exercise and the relation of the sovereign to the subjects or citizens.

In America this phrase is used in a more restricted sense. Since the fundamental law of the United States and of every state is expressed in the form of a written instrument, constitutional law has been defined as the interpretation and construction of these documents, and the application of them to statutes and other public

⁶ *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Moose v. Alexander County*, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917 E 1183.

⁷ *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C 200.

⁸ See Chap. 6.

acts. Under this system the Constitution is in every real sense a law, the lawmakers being the people themselves, in whom under our system the residuum of all political power and sovereignty resides, and through whom such power and sovereignty primarily speaks.⁹

§ 4. Meaning of Constitutional. The term "constitutional" is used to describe a law which conforms to the Constitution and agrees with it. In the United States it means a law that is not in violation of any provision of the Constitution of the United States, or the expressed or implied restrictions upon legislative action contained therein, or, if a state statute, not in violation of the state constitution or the Constitution of the United States.¹⁰

§ 5. Meaning of Unconstitutional. An unconstitutional law, although a contradiction in terms, may be defined as one inconsistent with the Constitution, or in conflict with one or more of its provisions, as these have been interpreted by the Supreme Court. It is an act which is in excess of the authority of the legislature to enact. Mr. Justice Field defined it by saying: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed."¹¹ Chief Justice Marshall declared that an act repugnant to the Constitution was void, and that such an act could not become a law. Chief Justice Hughes has criticized these statements as being too broad. "It is quite clear," he said, "that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become

⁹ State v. Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30; Carter v. Carter Coal Co., 296 U. S. 238, 80 L. ed. 1160; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A. L. R. 1018.

¹⁰ 1 Bouvier Law Dict. (3rd Rev.) 641.

¹¹ Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178.

vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute, and of its previous application, demand examination." ¹²

§ 6. Constitutional Powers. This phrase as commonly understood is used to describe the powers granted by the Constitution of 1787 and its amendments, or, in the case of the states, by the state constitutions. These powers are of two kinds, express and implied.

Express powers are those expressly granted by the Constitution to the Federal government. They are also called enumerated powers and specific powers. Examples of these powers are the power of the Federal government to coin money and to regulate its value; to establish post offices and post roads; to regulate commerce with foreign nations and among the states and to borrow money on the credit of the United States.

Implied powers are those which are implied or derived from the powers expressly granted by the Constitution of 1787. They are incidental to these powers or to other implied powers. These powers were not set forth in the Constitution. Neither were they expressly or impliedly excluded from it. In 1819 Chief Justice Marshall, citing Clause 18, Section 8 of Article I. of the Constitution, announced the doctrine that Congress could enact all laws necessary and proper for carrying into effect the express powers of the Constitution. "Let this be done," he charged, "The subject is the execution of those great powers on which the welfare of a nation depends. . . . This provision is made in a constitution intended to endure for ages to come and, consequently, to be adapted to various crises of human affairs. To have prescribed the means by which the government should in all future time execute its powers, would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by inimitable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." With this vision the vast powers now exercised by the Federal government

¹² *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *Chicot County Drainage Dist. v. Baxter State Bank*, 308

U. S. 371, 84 L. ed. 329. See also *Allison v. Corker*, 67 N. J. L. 596, 52 Atl. 362.

in the administration of our internal and domestic affairs were provided for.¹³

§ 7. Inherent Powers. The inherent powers of a government are those which are firmly and permanently infixed in it, because of its essential character and as an essence of its existence. They are an authority possessed by it without being derived from any other source. They are such as result from the very nature of the government and are necessary for its existence and its protection.

These powers exist as permanent attributes of the sovereignty of a state or nation. They are possessed by our government by reason of its sovereignty. They exist independently of the Constitution of 1787. We may see these powers operating in the Federal government where they relate to foreign and external affairs. They may also be found in the state governments, where they are exemplified by the police powers.¹⁴

§ 8. Bill of Rights. A bill of rights is a summary of rights and privileges claimed by the people. In a constitution it is a formal declaration of the fundamental, natural, civil, and political rights of the people, which are secured and protected by the government. The principles guaranteed by a bill of rights, as well as the idea and name, are English. In 1688 William and Mary had accepted the Crown upon the conditions contained in a Declaration of Rights, and one year later this declaration had been embodied and confirmed by the Convention Parliament as a Bill of Rights. This act became the coping-stone of English constitution building.¹⁵

Our Federal Constitution does not contain a Bill of Rights. The founders of our government, in writing the Constitution of 1787, assumed the liberties of the people to be firmly established and did not write them into that fundamental law. The people of this country, however, expressing their objections through the state

¹³ *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579.

¹⁴ For further discussion, see Chap. 17, § 188, *infra*; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255; *Fuller v. Mississippi*, 100 Miss. 811, 57 So. 6; 39 L. R. A. (N. S.) 242;

Atchison Street Ry. Co. v. Missouri Pac. Ry. Co., 31 Kan. 660, 3 Pac. 284; *Fong Yue Ting v. United States*, 149 U. S. 698; 37 L. ed. 905; *Ekin v. United States*, 142 U. S. 651, 35 L. ed. 1146.

¹⁵ *Taswell-Langmead*, English Const. History (8th Ed.) 624.

conventions called for the ratification of the Constitution, refused to accept the Constitution as offered to them until assured of the adoption of amendments that would enumerate and preserve their liberties. Accordingly, during the period from 1789 to 1791, there was adopted the "Bill of Rights" contained in the first ten amendments to the Federal Constitution. Every state constitution contains a written bill or declaration of rights.¹⁶

The purpose of a Bill of Rights is to establish the subjects covered by it as legal principles to be applied by the courts. It is, therefore, a limitation upon the powers of the Federal government or of the particular state government as well as every department, officer, and agency of such governments. It is a limitation upon all legislative action, and no law can be sustained which trenches upon the rights guaranteed, or which conflicts with any limitation contained in the Bill of Rights.¹⁷ These declarations "breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. . . . They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade the vital rights of personal liberty and private property, 'Thus far shalt thou come, but no further.' " ¹⁸

§ 9. Sovereignty Defined. The term "sovereignty" may be defined as the supreme political power of the state which, determines and administers the government. It is the combination of all power to do everything within a state without accountability. "By sovereignty in its largest sense is meant supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern," wrote Justice Story. "A state which possesses this absolute power, without any dependence upon any

¹⁶ *Allen v. State*, 183 Wis. 323, 197 N. W. 808, 39 A. L. R. 782; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463. For examples see Constitution of Connecticut, Art. I; Constitution of Pennsylvania, Art. I; Constitution of Michigan, Art. XVIII; Constitution of California, Art. I; Constitution of Texas, Art. I; Constitution of Illinois, Art. II; Constitution of Louisiana, Art.

I; and Constitution of New York, Art. I.

¹⁷ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 87 L. ed. 1628, 147 A. L. R. 674; *Atchison Street Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 Pac. 284.

¹⁸ *Justice Brown in State v. Stuart*, 97 Fla. 69, 120 So. 335, 64 A. L. R. 1307.

foreign power or state, in the largest sense is a sovereign state."¹⁹ In the United States sovereignty may be said to have two distinct aspects. These are commonly known as external sovereignty and internal sovereignty.

External sovereignty relates to foreign and external affairs. In international law a state is considered sovereign when it has an established organized government, and occupies permanently a fixed territory. External sovereignty implies the authority to exercise all the powers concomitant with membership in the family of nations, such as the power to make treaties upon an equal basis with other nations, to make war and peace, to appoint and receive ambassadors, to acquire territory, to carry on commerce, and otherwise to enjoy the freedom and autonomy of an independent nation. The fact of sovereignty is usually established by the general recognition of other states. Until this recognition becomes universal, a state cannot be said to be sovereign.²⁰

Internal sovereignty relates to internal and domestic affairs, and in its final analysis is divided into four great powers, namely the legislative, the executive, the judicial, and the administrative. It implies the power of the state to adopt a constitution or a system of government, or to change or alter its government; to control its private affairs; to regulate the rights of its citizens; and to govern their relations with each other, without interference or control of any other state or political community.²¹

Abstractly, sovereignty in a democracy resides in the people in their collective and national capacity, and the term "people" is used here in a broad and comprehensive sense, meaning the inhabitants of the state. Under the Constitution of the United States and the several state constitutions, sovereignty, except for the sovereign powers granted to the Federal government or to the state governments or which are inherently existent therein, resides in the citizens of these political units, and they can exercise the residue of sovereign power vested in them only through the organs provided by these constitutions.²²

¹⁹ Story, Constitution (4th Ed.) § 207.

²⁰ *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 316, 81 L. ed. 255.

²¹ *People v. Tool*, 35 Colo. 225,

86 Pac. 224, 117 Am. St. Rep. 198.

²² *Chisolm v. Georgia*, 2 Dall. (2 U. S.) 419, 1 L. ed. 440; *In re Incurring State Debts*, 19 R. I. 610, 37 Atl. 14; *Solon v. State*, 54 Tex. Cr. 261, 114 S. W. 349; *Soxby v. Sonnemann*, 318 Ill. 600, 149 N. E. 526; *Carter v. Carter Coal*

§ 10. **Republican-Democratic Form of Government; Use of Terms.** The terms "Republican form of government," "Democratic form of government," and the terms "Representative Republic" and "Representative Democracy" are used interchangeably in texts and cases. Section 4 of Article IV. of the Constitution of 1787 provides that "The United States shall guarantee to every state in the union a republican form of government."

These phrases are generally not distinguished. They mean only such a government as is under the control of the people, a government by the people through representatives appointed by them either by direct vote, or some intervening officer or body by them selected and appointed by direct vote for the purpose. At the time the Constitution was adopted there were thirteen states, each supreme in its domestic affairs, and in each the government was divided into three departments—legislative, executive, and judicial—and carried on through representatives selected from time to time by the vote of the people. At the same time local governments for municipalities and other state subdivisions in some of the states were pure democracies. When the Federal Constitution was adopted, no state was called upon to amend its plan of government, and no question was raised about these governments being republican.

The distinction, therefore, between a republican form of government and a democratic form of government in the sense in which the term is used in the Constitution is more theoretical than real, for the vital idea in both is government by the people; and whether the will of the people be expressed through a representative or through the personal announcement of the voter in a public assembly amounts to but a difference in the form of expression. The action of the representative must proceed upon the theory that he is expressing the will of the constituency.²³

Co., 206 U. S. 238, 80 L. ed. 1160; 2 Bouvier Law Diet. (8th Ed.) 3096; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; Dred Scott v. Sandford, 19 How. (60 U. S.) 382, 15 L. ed. 691 (700); Perry v.

United States, 294 U. S. 330, 79 L. ed. 912, 95 A. L. R. 1335.

²³ Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912 C 994.

CHAPTER 2

PRE-CONSTITUTION DEVELOPMENT

The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much more enduring is it likely to prove. There is little in this Constitution that is absolutely new. There is much that is as old as the Magna Charta.

—Sir James Bryce

§ 11. **In General.** The period of pre-constitution development extended over an era of one hundred and eighty years. It began with the settlement of Virginia in 1607 and continued until the adoption of the Constitution in 1787. During this period the principles and form of the Constitution were evolved.

The form of the Constitution was purely American.¹ The origin of the principles was Anglo-European and American. Those of Anglo-European origin were the product of more than a thousand years of historical development. Upon the settlement of the colonies, many of these principles were incorporated in colonial charters, and were later drafted into the constitutions of the states and into the Articles of Confederation. A few were embodied directly in the Constitution.

The principles of American origin had been developed through the state constitutions and the Articles of Confederation or had been adopted from other sources or invented by the members of the Constitutional Convention. Among these principles was the idea of union. This principle developed independently of the processes of representative government.

¹ See Warren, Congress, The Constitution and the Supreme Court, Chap. I.

§ 12. **Principles of English Origin.** The Constitution is a product of the Anglican legal system. We may find its genesis in such documents as the Magna Charta, which was a codification of many of the guaranties of individual liberty then existing, and its interpretation by Lord Coke and other great English judges; in the Petition of Right; in the Bill of Rights; in the Habeas Corpus Acts; in the charters of English trading companies; and in the charters of English cities, towns and boroughs. We may find it also in the evolution of the principles of representative government which may be traced back to the primitive institutions of the Anglo-Saxons and was first exemplified nationally in the call of the English parliament by Simon de Monfort in 1265.

As early as 1687 William Penn published in Philadelphia an edition of Magna Charta, together with certain other constitutional documents. From that time until the adoption of the Constitution in 1787 there was a gradual transplanting of the principles of English constitutional law and of the English common law in America.²

The most outstanding example of these principles are the powers of external sovereignty. These powers passed directly from the British Crown to the colonies as a union acting in their collective corporate capacity as the United States of America, immediately upon the signing of the treaty of peace at the conclusion of the Revolutionary War.³

Other examples will be found in the Constitution. (a) It gives the sole power of impeachment to the house, and the sole power to try impeachments to the senate. Impeachment is thus recognized as a well known and established procedure. Yet impeachment was known only to the common law and could be understood only by reference to its principles. (b) Congress was authorized to pro-

² The Anglican is the youngest of the world's sixteen legal systems. These systems are as follows: Egyptian prehistoric times to 31 B.C.; Mesopotamian, 4000 B.C. to 100 A.D.; Chinese, 3200 B.C. to date; Hindu, 2200 B.C. to date; Hebrew, 2100 B.C. to 200 A.D.; Maritime, 1500 B.C. to date; Greek, 1200 B.C. to 300 A.D.; Roman, 700 B.C. to 600 A.D.; Keltic, 600 B.C. to 1600 A.D.; Germanic, 200

B.C. to 1500 A.D.; Papal, 400 A.D. to 1600 A.D.; Japanese, 500 A.D. to date; Mohammedan, 600 A.D. to date; Slavic, 800 A.D. to date; Romanesque, 1000 A.D. to date; Anglican, 1100 A.D. to date. Wigmore, *Panorama of the World's Great Legal Systems*; Mott, *Due Process of Law*, 108.

³ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

vide for the punishment of felonies committed on the high seas, and for punishing certain other crimes, and the common law furnished the only definition of felonies. (c) The trial of crimes, except in the case of impeachment was to be by jury, and the Constitution speaks of treason, bribery, indictment, cases in equity, due process of law, corruption of blood, a uniform system of bankruptcy, attainder, and the Writ of Habeas Corpus, and all of these are common law terms. "When the people of the United colonies separated from Great Britain," declared Chief Justice Waite, "they changed the form but not the substance of their government. They retained for the purposes of government all powers of the British Parliament, and, through their state constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."⁴

It is a notable fact that many principles of our constitutional law are so firmly imbedded in the common law and in the English background that our courts have constantly studied and referred to them in endeavoring to understand and interpret our Constitution.⁵

One eminent jurist referred to our legal system as an American graft upon British jurisprudence, and Justice Seawell of the Supreme Court of North Carolina, considering this heritage, declared: "The admonition—requiring frequent recurrence to fundamental principles is politically sound. Only in this way may we avoid a break with tradition that preserves the spirit, and often the letter of the law. One of the cardinal rules of construction as applied to the Constitution is that it must be interpreted in the light of its history. This is peculiarly demanded . . . when we are dealing with principles which have a key position in our political set-up, and [when we are] endeavoring to give them the scope and effect the framers of the Constitution, and the people to whose genius it was acceptable at the time of its adoption, intended

⁴ Munn v. Illinois, 94 U. S. 123, 24 L. ed. 77.

⁵ Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 38 A. L. R. 131; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A. L. R. 1129; Lynch v. Clark, Sandf. Ch. (N. Y.) 583, 652; Mott, Due Process of Law, Chaps. II-VIII; Taswell-Langmead,

English Const. History (8th Ed.) 95-127, 214-223, 523-527, 597, 624-657; Knot's Case, 10 Ct. Cls. 397; Schick v. United States, 195 U. S. 68, 49 L. ed. 199, 1 Ann. Cas. 585; Murray v. Chicago & N. W. R. Co., 62 Fed. 24; Gatton v. Chicago, R. I. & P. R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556.

them to have. . . . Knowledge of the sources from which these provisions of the Constitution came, and the political conditions which gave rise to them, is a part of the common learning of all English speaking peoples." ⁶

This development was a normal result of the colonists having migrated from England and having been under English rule for the greater part of two centuries. The statesmen, who drafted the Constitution and submitted it to the states for adoption, were born and educated in the atmosphere of the common law and thought and spoke its vocabulary. Many of these were lawyers who had been educated in the Inns of Court in London. Among them were five signers of the Declaration of Independence and six members of the Constitutional Convention. These lawyers, as well as other statesmen, were familiar with the old classics of the English law, such as Coke and Blackstone, which were quoted as authorities in colonial courts in support of judicial decisions. While the Founding Fathers were familiar with other forms of government, as is indicated by their earnest study and consideration of them, when they came to express their conclusions in a fundamental law, they drafted them in the terms of the common law, confident that they could be plainly and easily understood.⁷

§ 13. Principles of American Origin. On the other hand it is equally true that many principles and provisions of the Constitution are of American origin. When the principles of the common law and of English institutions were transplanted in America, only such portions of them as were applicable to conditions here were

⁶ Justice Baldwin in *State v. Main*, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

⁷ See Bedwell, *American Middle Templars*; Vol. XXV *American Historical Review* pp. 680-689. Included in this list were Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., and Arthur Middleton of South Carolina; and Thomas McKean, New Jersey, signers of the Declaration of Independence; and John Blair, Virginia, John Dickinson, Delaware,

William C. Houston, New Jersey, Jared Ingersoll, Pennsylvania, and John Rutledge, South Carolina, members of the Constitutional Convention. Colonial libraries contained many copies of Coke's *Institutes and Commentaries on Littleton*, and more copies of Blackstone's *Commentaries*, published in 1765, were sold in America than in England. An examination of 228 cases showed Coke cited 294 times. Mott, *Due Process of Law*, Chaps. II, VII; *Ex parte Grossman*, 267 U. S. 87, 69 L. ed. 527, 38 A. L. R. 131.

used, and in order to complete our system of representative government principles indigenous to American life were evolved.

These principles belong to two classes. The first relates to the framework of the national government, to the legislative, executive and judicial departments, and their powers and relations to each other. These provisions are a mixture, being partly English and partly American. They are English as to their source and American in so far as it was necessary to modify and adapt them to American life. The second class is solely American, being concerned with the relations of the Federal government to the state governments and to limiting the powers of these governments. The sources of these provisions are found in plans for defense against the Indians; in charters and other documents of the colonies; in state constitutions; and some of them were created during the framing of the Constitution in the Philadelphia Convention.

An enumeration of these provisions will illustrate their purely American origin. They were the simple, practical provisions required to complete the constitutional structure, and were without any prototypes among English institutions. They include principles relating to the union generally, such as (a) the name United States of America; (b) the principle of restrictions upon the powers of Congress; (c) the principle of restrictions upon the states; (d) the regulation of commerce among the states; (e) intercourse between the states; (f) debts contracted by the states shall be valid against the Federal government; (g) Congress shall protect each state from invasion and from domestic violence; (h) the United States guarantees to each state a republican form of government; (i) Congress shall have exclusive jurisdiction over such district as shall become the seat of government, and shall have power to dispose of and to make rules and regulations for the territory and other property of the United States; (j) the President may require opinions in writing from the principal officers of the executive department; (k) the times, places and manner of holding elections shall be prescribed by the states, but Congress may at any time alter such regulations, except as to the places of choosing the senators; (l) no senator may hold any office which has been created or the emoluments thereof increased during the time for which he was elected; (m) new states may be admitted to the union, but no new state shall be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned and of Congress; (n) no state shall

lay any imposts or duties on imports or exports, or enter into a compact with another state or with a foreign power unless invaded; (o) vessels bound to and from one state shall not be obliged to enter, clear or pay duties in another; (p) the Constitution shall be established by ratification by nine states; as well as other provisions of the Constitution and amendments.

§ 14. Colonial Charters. The charters of the thirteen colonies were the earliest expression of English constitutionalism in America. The first of these charters was that of Virginia, which was granted in 1606. The second was the charter of Massachusetts received by that colony in 1620. From these dates to 1701, thirty-two fundamental or constitutional laws were granted to the different colonies. These charters were the bases of all constitutional rights for a period of one hundred sixty-nine years, and the fact that no new charter was granted to any of the colonies for a period of seventy-five years prior to the Declaration of Independence shows that the form of government maintained was acceptable to the people.

The charters provided for complete colonial and local governments. Being based upon the principles of the English common law and the English institutions, they established a framework of government similar in form to their English background. Beginning with a form of absolutism in the early Virginia charters, they gradually developed the principles of representative government. By the time of the Revolution, the government consisted of a governor, a council and a provincial assembly. There was a system of courts, including both trial and appellate, and with a right of appeal to the Privy Council of England. The common law had become the basis of all rights and privileges. The perfection of these systems of government may be illustrated by the charters of Connecticut and Rhode Island. The first retained its colonial charter until 1818, and the latter until 1842, long after the adoption of the Constitution of the United States.⁸

Many well-defined principles of government, which were later to be written into our Federal Constitution were long tested in the crucible of colonial charters, as we will find by an analysis of a few illustrations. (a) The principle of representative government expressed in the provision for a House of Representatives and the

⁸ See generally LaBaree, *Royal Government in America*.

Senate was found in the Virginia Charters of 1609 and 1611-1612, and assumed definite form in the Ordinances of Virginia in 1621 which provided for a general assembly, in the Maryland Charter of 1632 and the Connecticut Charter of 1662. (b) Freedom of debate was provided for in the concessions of West Jersey in 1669. (c) Provisions for the adjournment of the legislative assembly appeared first in the Fundamental Orders of Connecticut in 1638 and were found in almost all later charters. (d) The power to declare war was possessed by every colony, and was generally lodged in the proprietor or governor. In several instances, it was in the governor and council. In only one was it in the general assembly. (e) Impeachment in the form of power of removal of officers first appeared in Connecticut Charter of 1662. The power of the general assembly to impeach, and the provincial council or higher chamber to convict, in a form similar to the Constitution of 1787, first appeared in the Pennsylvania Frame of Government of 1683. (f) The provision for a chief executive, called a governor or proprietor, first appeared in the Virginia Charter of 1609 and most of the charters thereafter. (g) The duty of the chief executive to execute the laws appeared in the Charter of Maryland in 1632, and also in later charters in Carolina, New Jersey and Pennsylvania. Other provisions of the Constitution may also be traced to the various charters.⁹

§ 15. Growth of the Idea of Union. The idea of union was indigenous to America. As the colonies developed, union became more and more necessary to protect them from the Indians, then from the French and Indians, and finally from the oppression suffered under English misrule.

Luckily, the colonists found a prototype for confederation close at hand. For more than one hundred years prior to the first English settlement, a confederacy existed among the five, later six, tribes of Iroquois Indians. This confederation dominated a great part of the territory now occupied by eastern and northern United States. The principal features of the confederation were: each tribe was an independent republic in its own affairs; they were united in all things affecting all the tribes in a way similar to the federation of our states; delegates from different tribes met in

⁹ Thorpe, American Charters,stitution of the United States, Chap. Constitutions and Organic Laws; V. Fisher, The Evolution of the Con-

an assembly similar to our Congress; these delegates debated and settled intertribal affairs under a chief; in the event of a war of offense or defense all the tribes united as a common force. The Iroquois sided with the English in the French and Indian Wars, and also during the Revolution. This confederation lasted for more than three hundred years. George Clinton of New York, after successfully securing a meeting of the sachems from the six nations with a convocation of deputies from Massachusetts in 1744, seven years later invited representatives from all the colonies to meet with these nations for the purpose of forming a league.

The example and power of this confederation undoubtedly suggested the first definite step toward union among the colonies. This was the adoption of the Articles of Confederation of the United Colonies of New England in 1643 by the colonies of Massachusetts, New Plymouth, Connecticut and New Haven for the purpose of offense and defense against the several nations of Indians. This New England confederation was governed by a General Court consisting of two delegates from each colony meeting once each year, and from which delegates they chose a president.

Further danger from the Indians brought about a second step toward union. It was the Albany Convention of 1684, attended by Massachusetts, New York, Maryland and Virginia and called to adopt concerted measures of defense against the Five Iroquois Nations. Ten years later, there was another meeting in this same city to frame a treaty of peace with these tribes. Commissioners attended this meeting from Massachusetts, Connecticut, New York, and New Jersey.

The first general plan of union was advanced by William Penn in 1697. The plan, being purely theoretical, provided for two delegates from each colony, who should meet as a Congress at least once a year during war, and at least once in two years during peace. This Congress was to be provided with power to settle all differences and complaints between the provinces. It provided for protection from debtors and offenders fleeing from one colony to another, and also provided for protection of intercolonial commerce, and for the safety of the colonies against public enemies.

The next plan was inspired by the British government. In 1754 it issued an order requiring the colonies to protect their frontiers in contemplation of the French and Indian wars. To effect a union for this purpose, twenty-five delegates from the seven northern colonies, met at Albany. Among these delegates was Benjamin

Franklin, who presented the Coxe-Franklin plan of union. It provided for a President-General appointed by the Crown, and a Grand Council to be chosen by representatives of the people of each of the colonies. It provided further that the President-General and the council, among other duties, should make all treaties of peace and war, raise armies and equip vessels, make laws and lay duties, issue money and settle accounts. This attempt at union, according to James Madison, "had no other effect than, by bringing these rights into more conspicuous view, to invigorate the attachment to them, on the one side; and to nourish the haughty and encroaching spirit (of England) on the other."

The movement toward union now entered a new era. Until this time the growth of the idea of union had been with full allegiance to England still recognized. The Albany Convention of 1765, however, emphasized a feeling that had been gradually developing in all the colonies. That was the union of the colonies with the idea of independence. The movement toward independence was supported by the constantly increasing population; which now numbered more than a million and a half of people, and caused migrations into territories won in the French and Indian Wars. This struggle proved to be a training school for concert of action in the contest that was rapidly approaching with the mother country.

The growth of the idea of union with independence took definite form with the meeting of the Stamp Act Congress in 1765. This Congress met to protest the enforcement of the British stamp taxes. Delegates from nine colonies attended. On October 19th they adopted a Declaration of Rights and Grievances, demanding all the inherent rights and liberties of natural born citizens of Great Britain, including no levying of taxes upon them without their consent, and trial by jury.

The next move toward independence and union was the first Continental Congress, which met in Philadelphia on September 5, 1774. All of the colonies except Georgia were represented. This was the first real general assembly of the colonies. The Revolutionary War was about to begin and the spirit of independence and union was particularly strong. On October 14th it adopted a Declaration of Rights, setting forth that the colonists could not be deprived of their life, liberty and property without due process of law; that they were entitled to all the rights, liberties and immunities of all

free and natural born subjects of England; that they were entitled to a free and exclusive power of legislation in their several colonial legislatures in all cases of taxation and policies relating solely to the colonies; that they were entitled to the common law of England, including trial by jury; that they had the right to peaceably assemble and to petition the king; that these rights and certain others enumerated by them were guaranteed by the immutable laws of nature, the principles of the English Constitution, and the charters and compacts of the respective colonies.¹⁰

The final assembly in the march toward union was the Second Continental Congress, which met in Philadelphia on May 10, 1775. All of the colonies were represented. This Congress adopted the Declaration of Independence and the Articles of Confederation. With the adoption of these far-reaching instruments of government, confederation was completed.¹¹

The union, therefore, existed before the Constitution, which was ordained and established to form a more perfect union. This fact was recognized immediately upon the close of the Revolutionary War. The treaty of peace of September 3, 1783 was concluded between his Britannic Majesty and the Union, which was recognized as the "United States of America."¹²

§ 16. Declaration of Independence. The Declaration of Independence was the first epochal step in the development of the Constitution. Politically it accomplished the following results: (a) It recognized the union of the states. It described them as "United Colonies," and the signers of the Declaration described themselves as the "Representatives of the United States of America in Congress assembled." (b) It was a joint statement of independence by all of the colonies. (c) It jointly absolved all the colonies from allegiance to the British Crown and dissolved all political connection between them and Great Britain. (d) It was the joint announcement of their full power to levy war, conclude peace, con-

¹⁰ For a study of the definitive history of the Continental Congress, see Burnette, *The Continental Congress* (1941).

¹¹ Taylor, *Origin and Growth of the American Constitution*, Chap. V, Appendix; Thorpe, *American*

Charters, Constitutions and Organic Laws.

¹² *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255. See also Burnette, *The Continental Congress*, Chaps. XI-XIII.

tract alliances, establish commerce, and to do all other acts and things which independent states may of right do. (e) It was the joint and mutual pledge of the states to support the Declaration.¹³

§ 17. State Constitutions. The conditions which inspired the Declaration of Independence also made necessary a change in the fundamental laws of the colonies, which had now become known as states.

As a result the period from 1776 to 1786 became the most important period of constitution-making in the history of the world. In May, 1776, anticipating the Declaration of Independence, Congress recommended to the states to adopt such government as should best conduce to the happiness of their people in particular and America in general. This recommendation was hardly necessary for the marathon of constitution-making had already started. New Hampshire had already adopted a constitution on January 5, 1776, and South Carolina had finished hers on March 26, 1776. Other constitutions were adopted as follows: New Jersey, July 3, 1776; Delaware, September 21, 1776; Pennsylvania, September 28, 1776; Maryland, November 11, 1776; North Carolina, December 18, 1776; Georgia, February 5, 1777; New York, April 20, 1777; Vermont, July 8, 1777; Massachusetts (Rejected) February 28, 1778; South Carolina, March 19, 1778; New Hampshire (Rejected) June 10, 1778; Massachusetts, 1780; New Hampshire, June 2, 1784; and Vermont, March, 1787. The period closed with every state, except Rhode Island and Connecticut, adopting one or more constitutions. The present Constitution of New Hampshire, adopted in 1792, and the present Constitution of Vermont, adopted in 1793, also belong to this period.

The period was distinguished by an evolution in the fundamental principles of government, such as has never been known in America before or since. The first Constitution of New Hampshire was a crude instrument. Its framers had no guides, except the colonial charters, which had made no advance for a period of seventy-five years. The state was called a colony and the legislature was known as a "council" for the colony, and was to appoint its own president. The constitution was to remain in force "during the present unhappy and unnatural contest with Great Britain." Contrasted with this constitution was that of South Carolina adopted only

¹³ For a study of the history of Declaration, see Becker, *The Declaration of Independence* (1942).

two years later. The colony was now called a state. The legislative authority was vested in a general assembly consisting of a senate and a house of representatives. The chief executive officer was the governor, who was commander-in-chief of the state. There was a lieutenant governor, who succeeded to the office in the event of the impeachment, removal, death, resignation or absence from the state of the governor. In addition, we find provisions for adjournment, for veto power, for declaring war, for a bill of rights and for the origin of money bills in the lower house, similar to the national constitution of 1787 and its first ten amendments.

Many provisions of the Constitution of 1787 were taken directly from these state constitutions. The following examples will illustrate how greatly the members of the Constitutional Convention drew from this source. The Constitution of New Hampshire of 1784 and the Constitution of Vermont of 1786 laid down the principle of the three separate departments: legislative, executive and judicial. Ten of the state constitutions provided that money bills should originate in the lower house, and four states said that it was the duty of the executive to execute the laws. The Georgia, Pennsylvania and Maryland constitutions contained articles for amendment similar in principle to those of the later national constitution, and unlawful searches and seizures were forbidden in the bills of rights and constitutions of eight states. Almost all of the states required trial by jury; that prisoners have counsel and the right to be confronted with accusers and witnesses. They forbade excessive bail and fines; preserved the freedom of the press; the right to petition; and the right to bear arms. Practically all of them made provision for a militia. Two of them forbade attainder for treason, four forbade the enactment of ex post facto laws, and two made illegal the granting of titles of nobility and hereditary honors.

The Constitution of Massachusetts, however, was the most notable, and served more than any other constitution as the prototype of the Constitution of the United States. It contained a bill of rights as complete as that of any state constitution of the present day. The government was divided into three departments. The legislative department was composed of a senate and house of representatives. The chief executive officer was the governor, who was empowered to prorogue the legislature in event of disagreement, who was commander-in-chief of the army and navy, who had the power of pardon, and who appointed judicial and military

officers. There was a lieutenant governor who was empowered to perform the duties of the governor during the governor's absence or disability, and who presided over the senate, but had no right to vote. It provided that the benefit of habeas corpus should not be suspended except by the legislature upon the most urgent and pressing occasion, and provided for raising money by taxation, for a census every ten years, and for amendment. In fact it was so complete and effective as a fundamental instrument of government that it is still in force after a period of more than one hundred and sixty-six years, being the oldest existing American constitution.¹⁵

§ 18. Articles of Confederation. While the state constitutions were thus developing into advanced forms of representative government, another vital step was taken toward union and the formation of a central Federal authority. It was the Articles of Confederation which were adopted by Congress on November 15, 1777 and finally ratified by the states on March 1, 1781. The continental congresses had organized armies, raised money, carried on the Revolutionary War, and adopted the Declaration of Independence, but their authority was based upon the necessity of the defense of the colonies, and not upon any charter or constitution. These articles effected the first constitutional confederation of the states. All plans discussed prior to this time were steps toward union, but they were not union, and did not develop into a form or framework of national government until the adoption of the Articles of Confederation.

The power of the Confederation was vested in a Congress of one house. Each state was represented by not less than two nor more than seven members. These members were paid by the states. Among the principal powers of this Congress were the following: to maintain land and naval forces; to declare and carry on war; to grant letters of marque and reprisal; to regulate weights and measures; to establish post offices; to borrow money; and to carry on diplomatic relations with other nations. The expenses of the confederation were apportioned among the states and were raised by taxes levied by the state legislatures.

¹⁵ State v. Brill, 100 Minn. 499, 111 N. W. 294, 10 Ann. Cas. 425; Thorpe, American Charters, Constitutions and Organic Laws: (This work published by the government printing office contains all Federal

and state constitutions, colonial charters, and other organic laws of the states, territories and colonies). See McLaughlin, The Confederation and the Constitution (The American Nation Series) Chap. VIII.

Certain restraints were placed upon the states, among which were the following: No state was permitted to grant titles of nobility, neither were they permitted to enter into treaties or relations with foreign governments or with each other. They were prohibited from maintaining an army or a navy in time of peace, except as deemed necessary by Congress. They could not engage in war, nor grant letters of marque and reprisal.

The articles provided for interstate relations. The most important of these were: the right of the citizens of one state to enjoy the privileges of trade and commerce in the several states; and the right to extradite a fugitive from justice. They further provided that full faith and credit should be given the records and judicial proceedings of one state in each of the several states. By these provisions, they acknowledged an interstate citizenship and a mutual equality of rights which were later embodied as fundamental rights in the Constitution. The articles provided for amendment upon the unanimous consent of all of the states.

These articles were an advanced step in the evolution of a more perfect union. The major results obtained from their operation were: (a) They formally recognized the union of the states; (b) they put in actual practice under a federal government and tested in the laboratory of national experience many of the principles and provisions that were later to be incorporated into the fundamental law which was written six years later; (c) they provided a school of statesmanship in which were trained many of the leaders who were destined to play a prominent role in the framing and adoption of the Constitution of 1787, and (d) they created a central Federal authority empowered to complete the Revolutionary War, to enter into a treaty of peace with Great Britain in 1783, and to become the recipient of the powers of external sovereignty when they passed from the British Crown.¹⁸

§ 19. Critical Period. Constitution-making in America suffered its most acid test during the period from 1781 to 1789, which George Washington called the most critical period in the formation of the American government. "The want of energy in the Federal government," he wrote, "the pulling of one state and parts of states against another; and the commotion among Eastern people, have sunk our national character much below par, and have brought

¹⁸ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

our citizens and our credit to the brink of a precipice. A step or two more must plunge us into inextricable ruin." These conditions were the logical sequence of the ending of the Revolutionary War and the separation of the thirteen colonies from Great Britain.

The end of the war had brought a complete readjustment of economic and social conditions. The prosperity due to the war had ceased, and the people had suffered an extended period of hard times and financial reverses.

The period was one of great political readjustment. The people had not become fully awakened to the responsibility resting upon them. During the war they had heard much about tyranny, the abuse of power, and the denial of natural rights, and they confused these practices with the legitimate restraints of a recognized government. As a result they were unwilling to surrender their political independence to a central national authority.

The Articles of Confederation contained many fatal defects. There was no provision for taxation or the raising of revenue or an army, except by requisition upon the legislatures of the states. The provisions for the control of commerce were conflicting and the states assumed control of interstate and foreign commerce. There was no Supreme Court or other tribunal vested with power to decide contentions or disputes between the states or between citizens of different states. The legislative and executive powers were blended in Congress, and it could do no more than recommend any act to the states. The Articles could not be amended or altered except with the consent of all of the states, and all attempts to create an effective government by this process had failed.

National affairs were deplorably bad. Hamilton described them as presenting an "awful spectacle" and Madison spoke of the Confederation as nothing more than "an alliance between independent states." The Federal government had no power to enforce the enactments of Congress, and all that it could do was to make requisitions upon the states, which could not be enforced except through an appeal to arms. Requisitions for money were ignored, Pennsylvania and New York being the only states to pay their full quotas. Although the states were forbidden to wage war or negotiate peace, Georgia waged war against the Indians and made peace with them.

Although the different states were forbidden to enter into any treaty, confederation or alliance, except with the consent of Congress, Virginia and Maryland entered into a compact regulating the navigation of the Potomac; and New Jersey and Pennsylvania

made a similar treaty with reference to the Delaware River. Although the states were forbidden to coin money, they issued paper currency, made it legal tender, and attempted by law to compel creditors to accept it.

Foreign relations were even worse than domestic affairs. European nations recognized our independence, but they did not recognize our rights as an independent nation. Spain, France and England took advantage of the weakness of our government. Spain held the mouth of the Mississippi River, and denied settlers on the Ohio and the Mississippi access to the Gulf of Mexico. Both Great Britain and France employed agents who interfered with the administration of the government. England especially endeavored to disintegrate the states, to destroy their commerce, to control their trade, to stir up rebellions, and to generally foment war among them.

§ 20. Triumph of Nationalism. The result of the failure of the Articles of Confederation and the uncertainties and futilities of the critical period was the triumph of nationalism, expressed in the form of the calling of a Constitutional Convention. On June 8, 1783, Washington sent the following message to the governors of the states:

"There are four things, which, I humbly conceive, are essential to the well being, I may even venture to say, to the existence of the United States, as an independent power. First, An indissoluble union of the states under one Federal head; secondly, A Sacred regard to public justice; thirdly, The adoption of a proper peace establishment; and fourthly, The prevalence of the pacific and friendly disposition among the people of the United States, which will induce them to forget their local prejudices and policies; to make those mutual concessions, which are requisite to the general prosperity; and in some instances, to sacrifice their individual advantages to the interest of the community. These are the pillars on which the glorious fabric of our independency and national character must be supported."

This message was supplemented by a voluminous correspondence by Washington and other leaders, as well as by resolutions of several state legislatures extending over the entire period to the calling of the Constitutional Convention. The temper of the discussions of the era may be judged by the exclamation of Charles Pinckney uttered in a debate in 1786. "Congress must be invested with greater powers," he declared, "or the federal government

must fall. It is, therefore, necessary for Congress either to appoint a convention for that purpose, or by requisition to call upon the states for such powers as are necessary to administer the federal government." ¹⁷

Happily, these views prevailed. A conference was held at Mount Vernon, and this was followed by the Annapolis Convention in 1786. This convention was held to consider the question of duties and of commerce in general. Representatives of only five states attended. These states were Virginia, Delaware, New Jersey, Pennsylvania and New York. Among the delegates was Alexander Hamilton, who was strongly in favor of adopting a new constitution. He persuaded the delegates to adopt a resolution calling for a convention for the purpose of rendering "The Constitution of the Federal government adequate to the exigencies of the Union." In February, 1787, Congress assented to the plan and issued a call for a convention of all of the states. This convention met in Philadelphia from May 13 to September 17, 1787.

§ 21. Work of the Constitutional Convention. The work of the Constitutional Convention was two-fold.

The avowed purpose of the Convention was to secure a remedy for the critical economic and social conditions of the period. This purpose was so well accomplished by the Convention that some authorities have considered that the Constitution was an economic document and was written for the sole purpose of remedying these ills. A noted scientist recently wrote "The Federal Constitution was a practical document, drawn up by representatives of the class of property owners, security holders, speculators in Western Lands, merchants and bankers, who wisely desired to escape from economic and fiscal chaos of the government under the Articles of Confederation." ¹⁸

An eminent historian propounded the conclusion that "The movement for the Constitution of the United States was originated and carried through principally by four groups of personal interests

¹⁷ Home Building & Loan Ass'n v. Blaisdell (see account in dissenting opinion of Justice Sutherland), 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Warren, The Making of the Constitution, 5, 6; Fiske, Critical Period of

American History (8th Ed.) 175; Warren, Making of the Constitution, Part I, Chap. I.

¹⁸ Prof. Harry Elmer Barnes, History and Social Intelligence (1926) (quoted from Warren, Making of the Constitution, 71-72).

which had been adversely affected under the Articles of Confederation; money, public securities, manufactures, and trade and shipping. . . . The Constitution was essentially an economic document," he said, "based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."¹⁹

The other purpose was inspired by a belief in a stronger national Union and in a greater determination to maintain it. "Historians who leave this factor out of account and who contend that these men were moved chiefly by economic reasons," says a recognized constitutionalist, "utterly fail to interpret their character and their acts. To appreciate the sincerity of the motives which inspired the framing of the Constitution, it is necessary to read the hopes and fears of the leading American statesmen prior to 1787."²⁰ That the members of the convention were inspired with a lofty purpose may be seen from a statement of James Madison made on January 11, 1788. "The real wonder is," he said, "that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the Revolution."²¹

The result of the work of the Convention was the adoption of the Constitution of the United States, which brought into existence a new government—a new political body. It completed the process, then long in development, of establishing the nation, already known as the United States of America, and which now assumed its place as a sovereign power among the nations of the world.²²

¹⁹ Prof. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1925) 324.

²⁰ Warren, *The Making of the Constitution*, 5.

²¹ Madison, *The Federalist*, XXXVII.

²² *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579; *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956.

CHAPTER 3

PHILOSOPHY AND FORM OF CONSTITUTION

The Constitutional fathers, fresh from a revolution, did not forge a political straight-jacket for the generations to come.

—Justice Murphy

§ 22. **Schools of Interpretation.** The philosophy and form of the Constitution has been profoundly influenced by two schools of interpretation which developed immediately upon its adoption in 1787, and which may be described as strict constructionists and liberal constructionists. Throughout our history the philosophies of these schools have been in sharp conflict, and we may find in the decisions many statements which have been confusing, and even contradictory. First one school and then the other has dominated the decisions of the Supreme Court.

In the days of Washington these schools were represented by the Federalists and Anti-Federalists. Then came the Marshallians and Jeffersonians. Marshall, anticipating the political will of the future, believed that a strong central government was necessary to our national development, and he formulated a judicial philosophy which to a great extent has permanently molded our national will. In such cases as *McCulloch v. Maryland* and *Martin v. Hunter's Lessees*, he expounded the Constitution as a progressive rather than a conservative force. The Constitution, he said, "was not intended to provide merely for the exigencies of a few years, but was intended to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." Jefferson, believing that the national government was being fostered at the cost of liberty, and at the expense of democratic principles and local self-government, was deeply disturbed. He continually opposed Marshall and on one occasion recommended that the House of Representatives impeach him.¹

¹ 3 Beveridge, *Life of John Marshall*, 531.

These schools, although with perhaps less intensity of feeling, still exist, and we may yet recognize them as strict and liberal constructionists.

In recent years, however, there have been refinements in interpretation which have made further classification necessary in order to understand the varying shades of philosophy expressed by the judges and judicial writers. There are the ultra-conservatives who classify the Constitution as a rigid, inflexible written instrument, and the conservatives who believe that it is flexible and subject to interpretation. The school of liberal constructionists has also two divisions. The one treats the Constitution as in the nature of a living organism or dynamic process, and is composed of the liberal leaders in national affairs. The other consists largely of historians, economists, teachers and others whose reasoning is not bound by legal precedent. In order to distinguish these two branches, the first has been referred to as the liberal school and the second as the pedagogical school.

§ 23. Ultra-Conservative School. The Constitution, according to the ultra-conservatives, is a rigid, inflexible, written instrument, whose meaning was fixed when it was adopted, and is not subject to any interpretation at a subsequent time which would change such meaning. It cannot receive any construction not warranted by the intention of its founders. It is not subject to the influence of public opinion. If new circumstances require changes, these must be made by amendment by the people themselves.²

"A constitution is not to be made to mean one thing at one time," according to Judge Cooley, "and another at some subsequent time when new circumstances may have so changed as perhaps to make a different rule seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond this control, that these instruments are framed. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require."³

² State v. Showalter, 159 Wash. 55; Rasmussen v. Baker, 7 Wyo. 519, 293 Pac. 1000.

117, 50 Pac. 819, 38 L. R. A. 733.

³ Cooley, Const. Limitations, 54-

Chief Justice Taney expressed this view when he said that "No one, we presume, supposes that any change should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty."⁴

§ 24. **Conservative School.** This school differs from the ultra-conservative school in that it views the Constitution, although written, as a flexible instrument. It acknowledges that the Constitution is written in general language and announces basic principles of government, but recognizes that it must be expanded or contracted to meet the changing conditions of society. By interpretation, it must be given the flexibility necessary to bring it in full accord with what the courts believe to be in the public interest. The flexibility does not apply to the *meaning* of the constitutional provisions, but to the *application* of the principles of the Constitution to new facts and conditions.

"It is the peculiar value of a written constitution," announced Justice McKenna, "that it places in unchanging form limitations upon legislative action. This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law."⁵

⁴ *Dred Scott v. Sandford*, 19 How. (60 U. S.) 393, 15 L. ed. 691.

⁵ *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568, 61 L. ed. 498.

"And in this there is no inconsistency," said Justice Sutherland, "for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

At the same time he announced the limits beyond which flexibility cannot go when he continued: "But although a degree of elasticity is thus imparted, not to the meaning but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions are found clearly not to conform to the Constitution, of course, must fall."⁶

§ 25. **Liberal School.** Extending the Marshallian philosophy, the liberals of the present era view the Constitution as a system of government. They argue that its written grants and limitations of powers should be treated as a course of government rather than as the boundaries of governmental power, and that there is a reservoir of unused power in the Federal government providing all the powers possessed by every civilized nation.

Justice Reed of the Supreme Court, during the time he served as Solicitor General, after recognizing the distinction between the strict and liberal constructionists already discussed, supported the liberals by saying: "The disagreements as to the meaning of the great clauses of the Constitution, forming the basis of social and economic legislation, is the surest evidence of their flexibility. It will be an unfortunate day if there is ever general agreement that the nation's exercise of Federal power has reached its limit; that no further changes however desirable or needed, cannot be accomplished without the uncertainties, delays and difficulties of fundamental constitutional amendments. . . . A reservoir of unused power, of indeterminate area, remains in the Federal government within the limits of the delegated powers. This area becomes one which is broad indeed when viewed together with the scope of the implied powers which may be necessary to make fully effectual the expressly granted powers. As implied powers may be derived from implied powers an even wider range for legislation is opened. The result is, as Justice Holmes has phrased it, that in matters re-

⁶ *Euclid v. Ambler Realty Co.*,
272 U. S. 365, 71 L. ed. 303, 54 A.
L. R. 1016.

quiring national action it is not lightly to be assumed that a power which must belong to and somewhere reside in every civilized government is not to be found."⁷

Justice Frankfurter, while professor at Harvard University, also contributed to the definition of the philosophy of this school. "Every legal system for a living society, even when embodied in a written Constitution," he wrote, "must itself be alive. It is not merely the imprisonment of the past; it is also the unfolding of the future. Of all the means for ordering the political life of a nation, a federal system is the most complicated and subtle; it demands the most flexible and imaginative adjustments for harmonizing national and local interests. The Constitution of the United States is not a printed finality but a dynamic process; its application to the actualities of government is not a mechanical exercise but a function of statecraft."⁸

Later Justice Frankfurter added to this statement. "From generation to generation," he declared, "fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. . . . Law whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being."⁹

Justice Holmes spoke of the Constitution as an organic, living institution. "The provisions of the Constitution," he said, "are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a

⁷ Reed, *The Constitution of the United States* (September, 1936) 22 *Am. Bar Ass'n Jour.* 601; *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641, 11 A. L. R. 984; *Rupert v. Caffey*, 251 U. S. 264, 64 L. ed. 261.

⁸ Frankfurter, Mr. Justice Holmes and the Supreme Court (1938) 75.

⁹ *Martin v. Struthers*, 319 U. S. 141, 87 L. ed. 1313.

being the development of which could not have been foreseen completely by the most gifted of its begetters." ¹⁰

This school has not gone so far as to say that powers not granted by the Constitution may be created. It does believe, however, that an emergency may justify a greater extension of the exercise of a power than had theretofore been employed. "While an emergency does not create power," announced Chief Justice Hughes, "emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." ¹¹ The possible far-reaching effect of this doctrine upon our constitutional theory is revealed by the fact that earlier the Supreme Court had held that the state and Federal governments, by the adoption of the Constitution of 1787, had been deprived of no powers, which ordinarily belong to and must reside somewhere in every civilized nation, and that this power belonged to the Federal government when the states were incompetent to act. ¹²

The ideal and ultimate goal of this school was expressed by Justice Reed in the article to which reference has already been made. "Surely the Founding Fathers," he concluded, "who provided for the federal control of commerce with the Indians, who limited the importation of slaves, protected the citizen against the writ of habeas corpus, safeguarded contracts, protected property from seizure for government use and the citizen from arbitrary punishment for crime could not have intended their government to be helpless in the emergencies of today.

"The opportunity and the necessity for government's service to its people cannot be confined within rigid limits. The Constitution sets no such bounds. It is a living, vital institution whose function is to guide and not to curb necessary governmental processes. So to construe and apply our organic law, to adapt its powers to the great ideal of social justice for the governed, is truly to preserve, to protect and defend the Constitution of the United States." ¹³

¹⁰ *Gompers v. United States*, 233 U. S. 604, 58 L. ed. 1115.

¹¹ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Wilson v. New*, 243 U. S. 332, 61 L. ed.

755, L. R. A. 1917 E 938, Ann. Cas. 1918 A 1024.

¹² *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366; *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641.

¹³ See note 7, *supra*.

The philosophy of this school has been expressed in several decisions of the Supreme Court which about 1936-1940 became definitely liberal in its views.¹⁴ In announcing these decisions the court overruled traditional decisions and doctrines of the Court. Referring to this action by the court Justice Jackson declared: "This court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."¹⁵ During the same time, however, the court affirmed the doctrine of our dual system of government, holding that a state could not directly tax an instrumentality of the Federal government.¹⁶

The liberals believe that these decisions represent a revival of the consciousness of constitutional government, the decisions being based upon the language and historic meaning of the Constitution rather than upon a super-common law consisting of decisions not applicable to present conditions. "We are having something of a Constitutional Renaissance at the present time," wrote Justice Jackson while he was still serving as Solicitor General, "a re-discovery of the Constitution. It is as if a painting which had been retouched by successive generations of artists were to have the successive layers of oils removed and the Old Master itself revealed once again. . . . I, for one, welcome the restoration. We are really back to the Constitution."¹⁷

§ 26. Pedagogical School. The scholars of this school view the Constitution from its operation as a system of government. They accept the written document of 1787 as the fundamental law, but declare that the real living Constitution is unwritten. It consists

¹⁴ Among these decisions were the following cases: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 710; *Graves v. O'Keefe*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466; *Mulford v. Smith*, 307 U. S. 38, 83 L. ed. 1092; *O'Malley v. Woodrough*, 307 U. S. 277, 83 L. ed. 1289.

¹⁵ *Murdock v. Pennsylvania*, 319

U. S. 105, 87 L. ed. 1292, 146 A. L. R. 81 (dissenting opinion).

¹⁶ *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21, 84 L. ed. 11.

¹⁷ Robert H. Jackson, *Back to the Constitution; An Old Master Recovered and Restored*, 25 *Am. Bar Ass'n Jour.* 745. See also radio address of President Franklin D. Roosevelt dated March 9, 1937 ("I want a Supreme Court that will refuse to amend the Constitution by the arbitrary exercise of judicial power").

not only of the original document but also of statutes supplementing this document, of decisions of the courts and of customs and usages of the Federal Government.

They look at the English Constitution as the prototype of the Constitution of the United States. This constitution consists of the following fundamental laws, namely: (a) Treaties and quasi-treaties such as the Act of Union with Scotland and the Act of Union with Ireland; (b) compacts such as the Magna Charta, Bill of Rights, Act of Settlement, Petition of Right, and the Habeas Corpus Act of 1679; (c) constitutional statutes; (d) precedents such as judgments or decisions of the courts, authoritative reports and lawyers' opinions; and (e) customs and usages of the English government. The Constitution of the United States in comparison consists of (a) The fundamental law of 1787; (b) amendments to this law; (c) statutes implementing the Constitution; (d) constitutional decisions; and (e) conventions and usages of the Federal government. The reasonable conclusion is that these constitutions are similar in form, and that, if we accept the English Constitution as unwritten, we must also describe this enlarged Constitution of the United States as unwritten.¹⁸

Dr. Hannis Taylor, an eminent authority on government, has supported this view. "Nothing could be more superficial than the attempt to differentiate the English and American Constitutions by the entirely false and misleading statement that one is written, the other unwritten," he said. "The fact is that the series of written documents in which each is now defined are equally precise, dogmatic and voluminous. In the last analysis, the fundamental difference that divides the systems is embodied in the fact that the ultimate power in the one is vested in the omnipotent Parliament, and the other in the Supreme Court of the United States."¹⁹

Speaking of customs, usages and statutes, Dr. Beard declared that "custom forms as large an element of our Constitution as it does in the case of the English Constitution, and that when viewed from the standpoint of content there is no intrinsic difference between many statutes and the provisions of the Constitution itself; and, if we regard as constitutional all that body of law relative to the fundamental organization of the three branches of the Federal government—legislative, executive and judicial—then by far the

¹⁸ Horwill, *The Usages of the American Constitution*, Chap. I. ¹⁹ Taylor, *Origin and Growth of Constitution*. 298.

greater portion of our constitutional law is to be found in the statutes." ²⁰

To these statements may be added that of Professor Tiedeman "The Federal Constitution," he remarked, "contains only a declaration of the fundamental and most general principles of constitutional law, while the real living constitutional law—that which the people are made to feel around and about them, controlling the exercise of power by the government and protecting the minority from the tyranny of the majority—the flesh and blood of the Constitution, instead of its skeleton, is here as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution." ²¹

The viewpoint of the advanced law teacher was set forth by Professor Albertsworth who defined the Constitution as the original document and amendments plus the constitutional decisions of the Supreme Court. "Regarded from the viewpoint of constitutional structure," he wrote, "the written Federal Constitution is the Great Blueprint, but nothing more than that. In almost 300 volumes of officially reported judicial decisions of the Supreme Court of the United States ²² will be found mirrored the real Constitution of the Federal government, and this has been the work of the Court, with the aid of counsel, and not that of any other organ or any other body of men. In fact the real Constitution of the United States today is a palimpsest, a document of formal or original draft with a glossary of judicial interpretation, usage of government, and traditional and historical background." ²³

The philosophy of this school has not been written into any cases. In fact, no court has yet denominated our Constitution as unwritten. We may assume, however, that many members of this group are liberal, perhaps ultra liberal, in their views. That this is not universally true, we may see from a statement by Professor Albertsworth. Speaking of the revision of the Constitution through decisions of the Supreme Court, he warned "Revision of

²⁰ Beard, American Government and Politics (1924) 81, 95.

²¹ Tiedeman, The Unwritten Constitution of the United States (quoted from Horwill, The Usages of the American Constitution, 23).

²² Number of volumes now considerably increased.

²³ Albertsworth, The Federal Supreme Court, and the Superstructure of the Constitution, 16 Am. Bar Ass'n Jour. 565.

the Constitution . . . appears evident in this reactive interpretation by the Court under the impact of economic depression. A powerful state with but few constitutional restraints; a powerful state with huge financial resources; a socialistic state superimposed upon the several states through grants-in-aid and matched doles, has been born and has grown to menacing proportions. Before it, the individual unorganized and alone, the several states, the Supreme Court, and the Constitution as earlier interpreted are in retreat."²⁴

§ 27. **Modern Trend.** The modern trend which began with the advent of the present century is toward a more liberal construction. Politically it was manifested first about 1902 in the "Square Deal" of President Theodore Roosevelt; in the "New Freedom" of President Wilson which he announced soon after his accession to the Presidency in 1913; and in the "New Deal" of 1933 of President Franklin D. Roosevelt. Its influence upon the Supreme Court began in 1902 with the appointment of Justice Holmes by President Roosevelt. Holmes was the first liberal justice of this period. His controlling philosophy of government was expressed in 1904 when he declared, "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine."²⁵ Holmes' work was supplemented by Justice Brandeis who was appointed by President Wilson in 1916. The liberal philosophies of these two justices were expounded in numerous able opinions, many of which were dissenting, for the next sixteen years. When Justice Holmes retired in 1932, Justice Cardozo, another great liberal, was selected by President Hoover to succeed him.

This trend was greatly accentuated by the complex social and economic conditions of the critical period extending from 1930 to 1940, as well as the extraordinary problems which arose during World War II. There is no doubt that the problems of these periods have flexed our constitutional structure in many ways. Our generation has been called upon to decide whether, under the Constitution, the government has power to solve such problems as the control of the mammoth industries, the control of the awaken-

²⁴ Albertsworth, *The Constitution*, Revised Version, 26 Am. Bar Ass'n Jour. 324.

²⁵ *Missouri, K. & T. R. Co. v. May*,

194 U. S. 267, 48 L. ed. 971. For a restatement of his philosophy, see *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 64.

ing power of labor, the prosperity of the farmer. and also to solve the great social problems of relief, unemployment, old age and social security in other ways. It has been called upon also to accept the numerous changes and alterations in our governmental structure due to the drafting of millions of men into our military forces, the regimenting of the life and habits of our citizens in civil life, and the regulation or seizure of many private businesses and other property. The power of the government to set up machinery to solve these exigent problems, as well as other problems of great importance to the American people, have depended upon the definition of the Constitution and the powers held by the Federal government. Liberal groups have struggled grievously with these problems, endeavoring to find a constitutional power to meet every vital need, and the result has been the extension of many of these powers far beyond their traditional limits.

This liberal interpretation has been enforced by all three departments, the legislative, executive, and judicial each joining in extending the powers of the Federal government. Under the leadership of President Roosevelt, Congress enacted such laws as the Agriculture Adjustment Act, the Social Security Act, the National Housing Act and the Wage-Hour Bill. It amended the Bankruptcy Act and the Pure Food and Drug Act, and undertook generally to enact laws to alleviate the effects of the social and economic crisis. To these should be added the Selective Service Act of 1940, the War Powers Acts of 1941 and 1942, and other laws enacted by Congress, and also the executive decrees proclaimed by the President in providing for the successful conduct of World War II. In the enactment of the National Industrial Recovery Act, the Agriculture Adjustment Act of 1933 and the Guffey Coal Act, Congress went so far that it exceeded its constitutional powers. Speaking of the delegation of power to the President under the N. R. A., Justice Cardozo in concurring in the unanimous decision of the Supreme Court holding the act unconstitutional charged that "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant."²⁶

The Supreme Court is committed to an ultra-liberal interpretation of the Constitution. The liberal minority, consisting of

²⁶ Schechter Poultry Co. v. United States, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947.

Holmes and Brandeis, and later of Brandeis and Cardozo, has been succeeded by an even more liberal majority. The philosophy of this liberal school was expressed as early as 1911 by the Supreme Court of Wisconsin. "Constitutional commands and prohibitions," wrote Chief Justice Winslow, "either distinctly laid down in express words, or necessarily implied from general words, must be obeyed and implicitly obeyed so long as they remain unamended and unrepealed. . . . But when there is no such express command or prohibition, but only general language or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt its progress, to stretch the state upon a veritable bed of Procrustes." ²⁷

In 1934 Chief Justice Hughes, in effect adopted this philosophy and gave us an answer to the questions propounded fourteen years earlier by Chief Justice Winslow, when he remarked: "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the Constitution meant to the vision of that day it must mean to the vision of our time. If, by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. . . . When we are dealing with the words of the Constitution we must realize that they have called into life a *being* the development of which could not have been foreseen completely by the most gifted of its begetters. The case before us must be considered in the light of our whole experience, and not merely of what was said a hundred years ago. . . . The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and spirit of the Constitution. This

²⁷ *Barguis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

development is a growth from the seeds which the fathers planted." ²⁸

In 1941 Justice Stone added to this statement. "In determining whether a provision of the Constitution applies to a new subject matter," he said, "it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence, we read its words, not as we read legislative codes,—but as the *revelation of the great purposes* which were intended to be achieved by the Constitution as a continuing instrument of government." ²⁹

An even more portentous development in the trend of liberal interpretation was the announcement that the powers of the Federal government in foreign and external affairs were inherent. In announcing this doctrine, in December, 1936, the Supreme Court declared that our national government possesses rights and powers equal to those of every other member of the family of nations, independent of the powers expressly or impliedly granted by the Constitution. This pronouncement was a notable victory for nationalism over the limitations of our written fundamental law. ³⁰

This decision marks the beginning of a new era in the growth and development of our constitutional government. (a) It confirmed the doctrine of inherent powers in the Federal government. (b) It affirmed that these powers were superior to the powers granted by the formal Constitution of 1787, Justice Sutherland saying: "It results that the investment of the Federal government with the powers of external sovereignty did not depend upon affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they never had been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality. (c) It abrogated the doctrine, so far as external sovereignty is concerned, that

²⁸ Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

²⁹ United States v. Classic, 313 U. S. 299, 85 L. ed. 1368. Italics were supplied by the author.

³⁰ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

the Constitution is a grant of powers. (d) It erased the doctrine of implied powers relating to external sovereignty. (e) It distinguished sharply between external and internal sovereignty, or between foreign and external affairs and domestic and internal affairs, and emphasized the difference as fundamental. (f) In effect, it confined the operation of our written Constitution to internal sovereignty and to the administration of the internal and domestic affairs of the government.

§ 27a. **Limit of Power.** The ultimate limit of the powers of the Federal government cannot be defined. It is a reasonable assumption, however, that the Supreme Court will continue to expound the Fundamental Law of 1787 and its amendments to meet the growing needs of the nation as they relate to both external and internal affairs. Undoubtedly, however, the most liberal of these schools will agree that the following limitations now exist:

- (a) They are the framework and the powers defined in the written Constitution. Congress cannot create new powers.
- (b) They are the powers defined in the amendments, including Amendment X. which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people."
- (c) There can be no treaty, statute, interpretation, or governmental custom that would alter the form or framework of our government or curtail the autonomy of the United States, or which would be a violation of a positive prohibition expressly established by the Constitution of 1787.
- (d) Our nation cannot legally be subjected to the influence or domination of a foreign power.
- (e) Our Constitution, laws, and policies can have no extra-territorial operation, unless in respect of our own citizens.
- (f) Our constitutional activities are limited to the broad field of political philosophy underlying the basic principles of the fundamental law of 1787. These basic principles are: (1) Representative government; (2) a dual form of government; (3) guaranty of individual liberty through constitutional limitations; and (4) an independent judiciary.³¹

³¹ See *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Geofroy v. Riggs*, 133 U. S. 256, 33 L. Ed. 642 (644); *Re Ross* (*Ross v. McIntyre*), 140 U. S. 453, 35

- (g) A substratal change in the principles of the Constitution, or in the organization of our government must be effected by the orderly procedure provided by the Fundamental Law of 1787 and not by force or fraud, or planned disobedience, or through a dictatorship, or through minority rule.

In 1943 Chief Justice Stone challenged the attention of his associates to several of these limitations. Speaking of certain recognized principles he declared: "My brethren of the majority do not deny that there are principles of the Constitution. . . . In the absence of any disclaimer I shall assume that there are such principles and that among them are at least the principle of constitutional protection of civil rights and of life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience. I assume also that all the principles of the Constitution are hostile to dictatorship and minority rule; and that it is a principle of our Constitution that change in the organization of our government is to be effected by the orderly procedures ordained by the Constitution and not by force or fraud."³²

L. ed. 581; *Asakura v. Seattle*, 265 U. S. 332, 68 L. ed. 332; *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641, 11 A. L. R. 984; *Ware v. Hylton*, 3 Dall. (3 U. S.) 199, 1 L. ed. 568; *United States v. Belmont*, 301 U. S. 324, 81 L. ed. 1134. See

also Chap. 11, §§ 106, 108, 109, *infra*; Chap. 13, § 135, *infra*; Chap. 15, § 166, *infra*; and generally Chaps. 20-26, *infra*.

³² *Schneiderman v. United States* (dissenting opinion) 320 U. S. 118, 87 L. ed. 1796.

PART II

GROWTH OF THE CONSTITUTION

CHAPTER 4

THE ORIGINAL DOCUMENT

Constitutions are not made—they grow.
—Sir James Mackintosh

§ 28. **Outline of Government.** Speaking broadly, the Constitution of 1787, except for defining the enumerated powers of the Federal government and limiting the powers of the states, was an outline of government, and nothing more. It was not intended as a complete governmental structure. Its provisions were written in general language and did not provide minute specifications of organization or power. Neither did they specify in detail how the organization should be made operative or define specifically how the powers should be enforced. It contemplated subsequent legislation and interpretation for carrying these provisions into effect. In this the framers were well advised, observed Sir James Bryce, “because it was essential that the people should comprehend the Constitution, because fresh differences of view would have emerged the further they had gone into details, and because the more one specifies the more one has to specify. . . . These sages were therefore content,” he said, “to lay down a few general rules and principles leaving some detail to be filled by congressional legislation, and foreseeing that for others it would be necessary to trust to interpretation.”¹

A brief analysis of the seven articles of the Constitution will readily reveal the nature and scope of its provisions. Article I. created the legislative department. It defined the powers of Congress; enumerated certain prohibitions upon these powers; and

¹ Bryce, *American Commonwealth* (New Ed. 1920) 374.

placed certain limitations upon the powers of the states. While it provided for the organization of the Senate and House of Representatives and the qualifications of senators and representatives, it did not define how the great powers entrusted to these bodies should be carried out, or what limits should be placed upon them, or whether the legislature or the courts should be the arbiter of these limits. Article II. created the executive department and defined in general terms the powers of the President and Vice President. While it set forth the qualifications of these chief officers, and set up an electoral college for their selection, it did not enumerate the other executive officers or create any machinery for the operation of the department. Article III. established the judicial department, including the Supreme Court; laid the foundation for the creation of a system of Federal Courts; and limited the jurisdiction of these courts. It did not, however, create a judicial system or prescribe the powers, practice and procedure of the several Federal courts, or define the relationship of these courts to the existing courts of the states.

Article IV. was devoted to the credit to be given records and proceedings of the states; the privileges and immunities of the citizens of the several states; the admission of new states; the making of needful rules and regulations respecting territory or other property; and the guarantee to each state of a republican form of government. While these provisions do not demand the development of the many details required by those of Articles one, two and three, yet they are not complete. For example, there are no rules or machinery for the admission of new states or for the government of territories. Articles five, six and seven, dealing largely with specific subjects are more complete. Article V. outlined the procedure for amending the Constitution. Article VI. validated the existing debts of the confederation; proclaimed the Constitution to be the supreme law; and required of all members of Congress, members of state legislatures, and all executive and judicial officers of the United States and the several states an oath to support the Constitution. Article VII. limited the number of states necessary for ratification by conventions to nine of the then existing thirteen states.

It was, therefore, manifestly not the intention of the framers that the Constitution should go into immediate effect without ancil-

lary legislation being necessary to the enjoyment of the powers defined, the rights established or the liabilities imposed by it.

§ 29. Constitution Not Self-Executing. Because it was largely an outline of government, the Constitution was not self-executing. To be self-executing, a constitution must be intended as a present enactment, complete in itself as definitive legislation by the people without contemplating subsequent legislation to carry it into effect.²

Chief Justice Marshall and Justice Story early recognized this fact in their judicial decisions. Marshall remarked: "A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and all the means by which they may be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. It would never be understood by the public. Its nature, therefore, requires that only the great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."³

In 1814 Justice Story discussed the subject in a leading case and spoke of the form of the Constitution with prophetic vision. "The Constitution," he said, "unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system

² State v. Harris, 74 Ore. 573, 144 Pac. 109, Ann. Cas. 1916 A 1156; Lyons v. Longmont, 54 Colo. 112, 129 Pac. 198; Cleary v. Kincaid, 23 Idaho 789, 131 Pac. 1117; Wren v. Dixon, 40 Nev. 170, 161 Pac. 722, Ann. Cas. 1918 D 1064;

Winchester v. Howard, 136 Cal. 432, 69 Pac. 77, 89 Am. St. Rep. 153.

³ McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; see also Fairbanks v. United States, 181 U. S. 283, 45 L. ed. 862.

itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold the exercise of its powers, as its own wisdom and the public interests should require."⁴

The doctrines of Marshall and Story are but a generalization of the power vested in Congress by the last clause of Section 8 of Article I. relating to the specific powers of the Congress, which provides: "Congress shall have power to make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

§ 30. Complete Constitutional Structure Mandatory. The Constitution was, therefore, mandatory in its requirement of a more complete constitutional structure. "The object of the Constitution," according to Justice Story, speaking of the responsibility of Congress under Article III., "was to establish three great departments of government, the legislative, executive and judicial departments. The first was to pass the laws, the second to approve and execute them, and the third to expound and enforce them. The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself; a construction that would lead to such a result cannot be sound. . . . The language . . . throughout is designed to be mandatory."⁵ This enlargement was necessary in order that the framework outlined in the Constitution might be built into an operating governmental machine.

§ 31. Enlarged Constitution—Self-Executing. This enlarged constitutional structure is self-executing. The amendments, statutes implementing the Constitution, constitutional decisions of the courts and the established conventions and usages have given us

⁴ Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

⁵ Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97. See also Fairbanks v. United States, 181 U. S. 283, 45 L. ed. 862; Taylor, Origin and

Growth of the Constitution, 298; Biggs v. Beeler, 180 Tenn. 198, 173 S. W. (2d) 144, 946, 153 A. L. R. 510 (mandatory provisions of a constitution are imperative commands).

a complete constitutional structure. Statutes have executed the nonself-executing provisions; constitutional decisions have pronounced the validity and scope of these statutes, as well as the ultimate definition of the provisions of the Constitution; and conventions and usages have filled in omissions which have not been the subject of statutes and decisions. Certain fundamental changes have been effected through amendments, although the line of demarcation of where a change should be by amendment or through statutes implementing the constitution and decisions, or even by custom, is not clearly drawn.

These changes have resulted in an organic growth. The original written document has been amended, expanded, construed, interpreted and applied to meet the many new conditions that have arisen since its adoption.⁶

⁶ See Chaps. 5, 6, 7, and 8, *infra*.

CHAPTER 5

AMENDMENTS

An amendment, by lawful proposal and ratification, becomes a part of the Constitution.

—Justice Roberts

§ 32. Constitutional Provision. The framers of the Constitution provided for its growth through amendment. They realized that it might, in the progress of time and in the development of new conditions, require fundamental changes, and they therefore provided an orderly manner in which these amendments should be made by the adoption of Article V. in the following language:

“The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the application of the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress—, provided that no state, without its consent shall be deprived of its equal suffrage in the Senate.”¹

§ 33. Method of Amendment. According to the provisions of Article V., amendment of the Constitution may be proposed in two ways:

- (a) By Congress.
- (b) By convention called by Congress upon application of two-thirds of the legislatures of the states. This method of proposing amendments has never been used.

Amendments proposed by either method must be ratified by three-fourths of the states. Ratification may be in one of two ways, as proposed by Congress.

¹ Const. Art. V; *Hawke v. Smith*,
253 U. S. 221, 64 L. ed. 871, 10
A. L. R. 1504.

- (a) By the legislatures of the states. All amendments except one have been ratified by legislatures.
- (b) By conventions held in each of the states. The Twenty-first Amendment was ratified by conventions.

A proposed amendment need not be presented to the President for approval or veto.²

The provision for the proposal of amendments either by two-thirds of both Houses of Congress, or on application of the legislatures of two-thirds of the states was intended to secure deliberation and consideration before any change could be proposed. Likewise, both methods of ratification, by legislatures or conventions, call for action by deliberate assemblages representative of the people, which it was assumed would voice the will of the people. The conservatism of the method of amendment is attested by the fact that only twenty-one amendments, out of several thousand proposed to Congress, have been submitted to the states and adopted by them.³

§ 34. Choice of Procedure in Congress. The choice of the mode of ratification, either by the legislatures or by conventions, lies in the sole discretion of Congress, irrespective of whether the amendment is one dealing with the machinery of government or with matters and conditions affecting the liberties of citizens. Article V. is a deliberate grant of power by the people to Congress giving it all authority in respect to the choice of the mode of ratification, and Congress therefore functions as the delegated agent of the people in the exercise of this power. The Tenth Amendment in no way modifies or limits the power Congress has in this respect.⁴

§ 35. Scope of Amending Power. The power of Congress to propose amendments is unlimited except for the vote required and the equal representation clause. The resolution proposing the amendment must be adopted by each house by a two-thirds vote. This requirement means a two-thirds vote of the members present and not two-thirds of the entire membership, present and absent.

² Re Opinion of Justices, 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412.

³ Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 10 A. L. R. 1504; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644.

⁴ United States v. Sprague, 282 U. S. 716, 75 L. ed. 640; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401.

The limitation as to representation refers to the power of the states in the Senate. No state can be deprived of its equal representation and suffrage in the Senate without its consent. This limitation means that an amendment to change the representation of the states in this body of the legislature would require the unanimous vote of all states.

An express declaration of the necessity of an amendment is not required. The adoption by both Houses of Congress, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. In fact, none of the resolutions proposing amendments have contained a statement of necessity.⁵ In the case of the Nineteenth Amendment, it was contended that the amendment went beyond the power conferred by the Constitution in that so great an addition to the electorate, if made without the state's consent, destroyed its autonomy as a political body. The contention was summarily rejected by the Supreme Court.⁶

§ 36. Ratification. Ratification must be by the states, acting through their legislatures or through conventions. Ratification by legislatures means ratification by the general assemblies or representative law-making bodies of the several states, composed of members elected by the people of the states, such as existed at the time of the adoption of the Constitution. Ratification is not subject to referendum by the states. It is not a legislative act within the provisions of state constitutions requiring submission to the vote of the people every bill or resolution having the force of law.

The ratification or rejection of an amendment is a Federal function derived from the Federal Constitution itself. By the adoption of Article V. the people divested themselves of all authority to either propose or ratify amendments to the Constitution. By the same article they vested this power in Congress, and designated the state legislatures and state conventions as representatives of the people, with authority to ratify or reject proposed amendments. When a state legislature, therefore, performs any act looking to the ratification or rejection of an amendment to the Federal Consti-

⁵ *Rhode Island v. Palmer* (National Prohibition Cases), 253 U. S. 350, 64 L. ed. 946.

66 L. ed. 505; *Barry v. United States*, 279 U. S. 597, 73 L. ed. 867; *Dillon v. Gloss*, 256 U. S. 368,

⁶ *Leser v. Garnett*, 258 U. S. 130, 65 L. ed. 994.

tution, it is not acting in accordance with any power given it by the state constitution, but is exercising purely a federal power.

Ratification by conventions is the exercise of this same power. When Congress proposes an amendment for ratification by this procedure, although it does not provide how or by whom such conventions shall be assembled, its direction that ratification shall be by conventions necessarily implies authority to provide for assembling of such conventions. The functions of the conventions are those defined by Article V.⁷

§ 37. **Time for Ratification.** The time in which an amendment must be ratified is a political and not a justiciable question. Under Article V. Congress has the power to fix a reasonable limit of time for ratification. If this limit is not fixed in advance of the submission of the amendment to the legislatures, it may be regarded as open for the consideration of Congress when, in the presence of certified ratifications by three-fourths of the states, the time arrives for the promulgation of the adoption of the amendment. The promulgation is made through the Secretary of State, and the decision of whether the adoption was within the proper time would also be made by Congress through the Secretary. This decision would not be subject to review by the courts.

It is well settled that an amendment must be ratified within a reasonable time. Exactly what is a reasonable time is subject to much discussion. When Amendments XVIII., XX., and XXI. were proposed, the time for ratification was limited in advance to seven years. In the case of *Dillon v. Gloss*, considering the Eighteenth Amendment, the court held that this period for adoption was reasonable, Justice Van Devanter saying: "We do not find anything in the Article (V.) which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary.

"First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.

⁷ *State v. Sevier*, 333 Mo. 662, Me. 544, 107 Atl. 673, 5 A. L. R. 62 S. W. (2d) 895, 87 A. L. R. 1412; *Hawke v. Smith*, 253 U. S. 1315; *Re Opinion of Justices*, 118 221, 64 L. ed. 871.

Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period which, of course, ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' ''⁸

The question was before the Supreme Court again in 1938 in the case of *Coleman v. Miller* considering the proposed Child Labor amendment then pending before the legislatures. This amendment contained no time limit for adoption. In January, 1925, the legislature of Kansas rejected the amendment and notified the Secretary of State of the United States of its rejection. In 1937 it adopted another resolution ratifying the amendment. The Supreme Court held that the question of what is a reasonable time as well as the right of the legislature to ratify an amendment, after it had previously rejected it and had officially notified the Secretary of the United States of its rejection, were political questions for the consideration of Congress, to be considered by it when the amendment came before it or the Secretary of State for promulgation.⁹

§ 38. Promulgation of Adoption. The final step in the adoption of an amendment to the Constitution is the publication of its adoption by Congress. In 1818 Congress enacted the following statute authorizing the Secretary of State to act for it:

“Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of

⁸ *Dillon v. Gloss*, 256 U. S. 368, 65 L. ed. 994.

⁹ *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385.

the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes as a part of the Constitution of the United States.”¹⁰

This publication is the final act in the procedure for the adoption of an amendment. The proclamation must be issued by the Secretary of State upon receipt by him of notice that the ratification has been adopted by the required number of states. He has no discretion to determine the truth of the facts stated in the notices from the states. The validity of the amendment apparently does not depend in any way upon this proclamation, but the proclamation is conclusive upon the courts upon such questions as to the required number of states having ratified the amendment and the validity of their ratifications.¹¹

§ 39. Effect of Adoption. Upon adoption, an amendment becomes a part of the written Constitution of the United States, and the Constitution and amendments must be regarded as one instrument, all the provisions of which are of equal validity and must be construed and interpreted by the courts as such. In case of any actual conflict between the original instrument and the amendment or between two amendments, the amendment being last in time, must prevail.¹²

An amendment may be repealed only by the adoption of a new amendment. During more than 159 years, only one amendment has been repealed. The Eighteenth Amendment was expressly repealed by Section 1 of the Twenty-first Amendment adopted in 1933.¹³

¹⁰ 5 USC 160.

¹¹ *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385; *Dillon v. Gloss*, 256 U. S. 368, 65 L. ed. 994; *United States v. Colby*, 49 App. D. C. 358, 265 Fed. 998; *Leser v. Garnett*, 258 U. S. 130, 66 L. ed. 505.

¹² *Prout v. Starr*, 188 U. S. 537,

47 L. ed. 584; *Schiek v. United States*, 195 U. S. 65, 49 L. ed. 99; *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38.

¹³ As to the effect of the repeal, See Amendment XXI and note 30 thereto, *supra*.

CHAPTER 6

STATUTES IMPLEMENTING THE CONSTITUTION

The Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted.

—Justice Brewer

§ 40. **Growth Through Statutes.** The mandate of the last clause of Section 8 of Article I. of the Constitution, and the doctrines of Marshall and Story which were discussed in Chapter 4 have enabled Congress to enact much legislation of a constitutional nature. The fundamental law of 1787 has been supplemented with a statutory growth that has made possible the effective administration of an ever expanding national government. Each of the three departments has developed from a limited number of Federal officers and employees in 1789 into a great bureaucracy in the present era. Practically the exercise of every power granted by the Constitution has been expanded, and the most important powers such as the war powers, commerce powers, money and fiscal powers, bankruptcy, and postal powers have been developed through congressional enactments into vast fields of increased governmental activity.

§ 41. **Character of Statutes.** Generally speaking a statute may be said to implement the Constitution when it is an element in completing the framework of government, or places in operation, or expands one of the powers granted by the Constitution, or extends the scope of the Constitution, or the domain of its operation. There is no definite line of demarcation between a statute that implements the Constitution and one that does not. The classification depends largely upon the character and effect of the enactment. These statutes are sometimes denominated constitutional statutes.¹

¹ The phrase "constitutional statute" should not be confused with the terms "constitutional" and "un-constitutional" which refer to the validity or invalidity of statutes. See Chap. 1, §§ 4 and 5, supra.

The following statutes may be considered examples of statutes within this classification: Judiciary Act of 1789; act or acts establishing legislative courts and special tribunals through the exercise of what may be described as the aggregate powers of Congress; acts expanding the Commerce Clause, the Postal Clause; and other acts enlarging the powers of the national government or one of its departments.

Likewise, statutes enabling our government to acquire and hold unincorporated territory as possessions, and not as states or incorporated territories, must be placed in this class. Examples of these statutes are those governing the acquisition and government of Puerto Rico, the Philippine Islands, the Canal Zone, Guam, Samoa, and the Virgin Islands.² In exercising this power Congress is not subject to the same constitutional limitations as when it is legislating for the United States.³

Other examples will be found in the following sections.

§ 42. Judicial Department. Article III. of the Constitution contains but three brief sections. The first section creates the Supreme Court, empowers Congress to establish inferior courts, and fixes the terms of Federal judges. The second briefly outlines the jurisdiction of the Supreme Court and other Federal courts. Section three defines the crime of treason and limits punishment for the crime.

Upon this foundation has been built our vast system of Federal courts. Under the authority expressly granted, Congress has created circuit courts of appeal and the district courts of the United States. Under its general powers, Congress has also established many legislative courts and special tribunals.⁴ These courts have been enumerated in a later chapter.⁵

The first enactment in this growth was the Judiciary Act of 1789. Other acts and amendments were adopted in 1875, 1887 and 1888. Judicial codes and amendments were enacted in 1903, 1911 and 1913. Speaking of the significance of this statutory growth, Justice Sutherland in a recent case remarked: "This conclusion in respect of jurisdiction of the courts, notwithstanding the per-

² 48 USC 731 et seq., 1001 et seq., 1301 et seq., 1411 et seq., 1431 et seq.

³ *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252.

⁴ *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789.

⁵ See Chap. 15, *infra*.

emptory words of the third article of the Constitution, is fortified by a consideration of certain provisions of the Judiciary Act of 1789. That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the Convention which framed the Constitution, and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest importance. . . . It is fair to assume that the framers of the statute, in using the words of the Constitution, intended that they should have the same meaning."⁶ We may observe here how closely statutes are interwoven with the Constitution and amendments in our constitutional structure.

The jurisdiction of the Federal courts has likewise grown. The jurisdiction defined in Article III. applies only to constitutional courts. Jurisdiction of the legislative courts is not thus limited.⁷ These courts, being created not by the power granted in Article III. of the Constitution, but by a combination of the general powers granted in Article I., Section 8 thereof, or through the general power of sovereignty existing in the Federal government, have such jurisdiction as shall be conferred upon them by Congress. This jurisdiction represents a statutory development of the powers granted in the Fundamental Law of 1787.⁸

§ 43. Legislative Department. Article I. of the Constitution vested all legislative power in Congress, outlined its organization and defined its powers. This organization and these powers have been expanded by the creation of additional organizations and the assumption of an ever-increasing lot of semi-legislative powers. For example, Congress has created many boards and commissions and has delegated to them administrative and other duties which are not strictly legislative. In this way it has given flexibility and practicality to the full performance of its legislative functions. Chief among the commissions was the Interstate Commission, which sits as an expert body with the power, upon notice and hearing, to

⁶ *Patton v. United States*, 281 U. S. 276, 74 L. ed. 854, 70 A. L. R. 263.

⁷ *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

⁸ See note 5, *supra*; see generally Chaps. 14, 15 and 16, *infra*.

fix rates, fares and charges relating to interstate carriers, and to issue other orders. Other commissions and boards performing like functions are the Federal Trade Commission, Federal Power Commission, Securities and Exchange Commission, Federal Communications Commission, and the Federal Reserve Bank Board.⁹

The delegation of additional duties to existing officers of the government may be illustrated by the Neutrality Act of 1939. Although Congress had the sole power to declare war, and to make regulations governing foreign commerce, this act gave the President the power by proclamation to declare that a state of war existed between two foreign states, and to declare a combat area. Thereafter, no American vessels could carry freight or passengers to such nations, or enter the combat zone, and no person within the United States could trade in the securities of such nations.¹⁰

The legislative department has been expanded largely through the extension of its powers. Almost every power granted to Congress has been supplemented or enlarged. The growth of the major powers will be discussed in separate paragraphs. In addition to these, statutes have been enacted carrying into effect such clauses as those relating to naturalization, fixing the standards of weights and measures, fixing the punishment for counterfeiting, establishing rules for obtaining copyrights and patents and punishing piracies. Even though the Constitution makes no provisions for registering trademarks, Congress has assumed control over them under the commerce clause.

The latest notable expansion of the legislative powers is the influence exerted over the states and the state legislatures in the fields of agriculture, relief, industrial recovery, social security and national highways through what is known as the grant-in-aid policy of the Federal government which, from a practical standpoint, has resulted in control in most, if not all, cases in which aid has been accepted by the states. The acts referred to are the Agriculture Adjustment Act, the Federal Emergency Relief Act, the Social Security Act, the Federal Highway Act, and other acts of similar requirements. For example, the Social Security Act provides that "from the sums appropriated therefor, the Secretary of the Treasury shall pay each state which has an approved plan for old age

⁹ 15 USC 41, 78, 78a; 12 USC 142 et seq., 641 et seq.; 16 USC 791. For a further discussion of administrative agencies, see Chap.

19, *infra*. See also *McChord v. Louisville & N. Ry. Co.*, 183 U. S. 483, 46 L. ed. 289.

¹⁰ 22 USC 245j.

assistance" the sums set forth in the statute.¹¹ The state statute then provides that "the department of Social Security . . . shall have power to cooperate with the Federal government through its appropriate agency or instrumentality in developing, extending, and improving such services; and receive and expend all funds made available to the department by the Federal government."¹² By such clauses, Congress has extended, and the states have accepted a new expansion of Federal power.

§ 44. Executive Department. Article II. of the Constitution vested the executive power in the President, or, upon his removal, death or disability, in the Vice President, and set up the machinery for their election. It defined the general powers and duties of the President. These powers and duties included the power to grant pardons; the power to make treaties; and appoint ambassadors and other officers; the power to address Congress and to convene Congress in special session; the power to receive ambassadors; and the duty to execute the laws.

Upon this structure has been built a vast superstructure of constitutional statutes. This superstructure is made up of (a) a complete organization of departments, secretaries and other civil officers; officers of the Army, Navy, and Air forces; commissions and other governmental organizations engaged in executing the laws; (b) a statute of succession; and (c) statutory powers supplementing and enlarging the powers granted by the Constitution.

The statutes effecting the organization of the executive branch relate to the ten chief departments, and to bureaus, boards and commissions. Each department is headed by a secretary. In contemplation, each department is an arm of the President, and the acts of the secretary within the scope of his powers are in law the acts of the President. In other words, the President speaks and acts through the heads of these departments. The boards and commissions include those tribunals which are administrative in character, and perform quasi-legislative and quasi-judicial functions as well, such as the Federal Trade Commission and the Securities and Exchange Commission.

A statute fixes the order of succession to the Presidency upon the death, removal or disability of both the President and the Vice

¹¹ 7 USC Chap. 26; 15 USC Chap. 16; 42 USC Chap. 7; 23 USC 1. ¹² Laws of State of Washington (1927) 114.

President.¹³ This statute completes the constitutional provision in accordance with the mandate in Clause 6 of Section 1 of Article II. This subject will be discussed further in Section 121 of Chapter 12.

The powers granted by Article II. have likewise been supplemented by statutes. Although every power granted by the Constitution has been expanded, those relating to emergencies are the most impressive. Under a statute adopted in 1934, the President may take over our systems of transportation and communication and use the armed forces of the United States to prevent any obstruction or retardation of communication. He may use, control, or close any radio station.¹⁴ He may seize any manufacturing industry.¹⁵ He may assume exclusive authority over the Panama Canal.¹⁶ During peace time, he may investigate, regulate and prohibit any transactions in foreign exchange. He has power to effectively control the banking system.¹⁷ In an emergency existing by reason of the shortage of electrical energy, the President acting through the Federal Power Commission may order the generation, delivery or transmission of electric energy as will in his judgment best serve the public interest.¹⁸

§ 45. War Powers. To understand the expansion of these powers we must consider the powers in the minds of the framers of the original document, and the extent to which those powers have grown in relation to foreign affairs, to internal affairs, and especially the extent to which they have been used to advance our economic development.

George Washington and Alexander Hamilton, as well as other members of the Convention had fought in the Revolution, and their experiences in the French and Indian wars were still fresh in their minds. These experiences were those purely of defense of their homes and lands, and of the protection of a nation of thirteen states. There is no evidence that they contemplated the nation participating in global wars. In fact, Washington in his farewell address warned against entanglements with foreign nations.

In contrast with this background, the war powers of the present era have been almost completely remolded. In so far as foreign and external affairs are concerned, we find that the national gov-

¹³ 3 USC 21.

¹⁴ 47 USC 606.

¹⁵ 50 USC 80.

¹⁶ 48 USC 1306.

¹⁷ 12 USC 205, 206; 31 USC 822a, 822b.

¹⁸ 16 USC 824a.

ernment holds the power to declare war as a necessary concomitant of nationality, and, when the framers of the Constitution in 1787 gave Congress this power, they were merely confirming the power that the Federal government had possessed, since the Treaty of Peace with Great Britain in 1783.¹⁹

Under the expanded powers resulting from this doctrine, millions of men have been conscripted through the operation of selective service acts during both peace time and war time. Our armies have been transported to Europe, to Asia, to Australia, and elsewhere to fight on foreign soil, and our naval and air forces have been deployed to every section of the world to settle issues vital to other nations, as well as to our own country.

The result of these activities has been an expansion of constitutional power to include our participation in a form of international government. In 1945 the United States became one of the leaders in the formation of the organization of the nations for the enforcement of peace and law, and for the establishment of a new international court. The action of Congress authorizing membership in this new world order thus further implemented the Fundamental Law of 1787.^{19a}

The war powers relating to internal and domestic affairs, especially those governing the organization of the army, navy, and air forces have grown to meet our responsibilities as a world power, and to protect the United States proper, as well as its insular possessions in the Atlantic and Pacific. Through statutes supplementing the Constitution, Congress has enacted laws governing the composition, organization and government of the army, and has adopted Articles of War. In the same way it has enacted laws governing the navy. In fact the orders, regulations, and instructions issued by the Secretary of the Navy, have the force of law when not inconsistent therewith. The same is true of army regulations, established by the Secretary of War with the approval of the President.²⁰

The war powers have been extended so as to give the President virtual dictatorial powers in time of war or other great national

¹⁹ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

^{19a} The Charter of the United Nations was adopted June 26, 1945 and was ratified by the United States Senate July 28, 1945. U. S.

Congressional Service (1945) Adv. Sheet No. 5, 2-74 to 2-114. See also Laws of 79th Congress, Chap. 652, Pub. Law 291.

²⁰ Gratiot v. United States, 4 How. 80, 11 L. ed. 884.

emergency. In fact, the courts have held that, during war, the powers of Congress are limited only by what is necessary to bring the war to a successful conclusion, except for the restriction of the Constitution relating to internal and domestic affairs.²¹

The war powers have been expanded to include projects for the economic development of the nation. The Supreme Court has affirmed the power of Congress under the war and commerce clauses to construct mammoth projects, to generate electric power and to irrigate millions of acres of desert land, such as the Wilson Dam in Tennessee and the Grand Coulee Dam and the Columbia irrigation district in Eastern Washington; that, having the power to build these dams, the government has the constitutional authority to dispose of the electric energy, generated by them.²²

§ 46. Commerce Powers. The commerce powers of the Federal government have had a growth equal to or exceeding that of the war powers, and this growth represents a distinct enlargement of the powers of the Federal government. Congress has used this clause to control and supervise business generally, because almost all businesses are engaged in some form of interstate commerce.

Discussing this clause, in 1829, James Madison wrote: "It is very certain that it grew out of the abuse of power by the importing states in taxing the non-importing and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for positive purposes of the General Government, in which alone, however, the remedial power could be lodged."²³

Commerce in the present era is largely foreign and interstate and Congress has enacted statutes regulating navigation and vessels; railroads; motor transportation, air commerce; telegraph and telephones, and radio. It has enacted such statutes as the Interstate Commerce Act, which created the Interstate Commerce Commission. Other acts are the Motor Transportation Act, the Air Commerce Act and the Radio Act. All these statutes represent a growth of power in Congress over forms of transporta-

²¹ 10 USC Chaps. 1-36. See § 153, notes 15-17.

²² *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688. See generally Chap. 17, § 204, *infra*.

²³ Letter James Madison to J. C. Cabell, February 13, 1829, Letters and other Writings of James Madison Vol. IV, 14-15.

tion. The result has been that our modern economy has emphasized affirmative regulation by the national government rather than following the objective of state restrictions contemplated by the framers.

The commerce power has been employed by Congress to regulate business generally, because the business regulated was engaged in some form of interstate commerce.²⁴ An excellent example of this regulation is the Radio Act of 1934 and its amendments. Under this act regulation means control. No radio station is permitted to operate without a license. Even each operator must have a license, and these licenses may be suspended at any time. This control has placed an almost unlimited power in the hands of the national government.²⁵ Another example is the sale of securities under the Securities Act of 1933 and the Securities Exchange Act of 1934, which require a registration of all securities offered to the public, except where the issue is confined to the limits of a single state.²⁶ Other regulatory acts are the Federal Water Power Act,²⁷ National Labor Relations Act²⁸ and Commodity Exchange Act.²⁹

This clause has also been used to protect the public from crime, fraud and deceit. Examples of these statutes are the White Slave Laws,³⁰ the Lindbergh Kidnapping Act³¹ and the Food, Drug and Cosmetic Act.³²

§ 47. Money and Fiscal Powers. Section 8 of Article II. of the Constitution defines the money and fiscal powers of the Federal government as the power to borrow money; to coin money and regulate the value thereof; and to provide for the punishment of counterfeiting.

As early as the day of Chief Justice Marshall, these clauses were held to be words of general description and marked only the outlines of the powers of the Federal government. "Congress must possess the choice of means," according to the Chief Justice, "and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."³³ Under this definition of its power, Congress has built upon these general

²⁴ For extended discussion and citations, see Chap. 18, *infra*.

²⁵ 47 USC Chap. 5.

²⁶ 15 USC 77a, 77aa-78jj.

²⁷ 16 USC 791-823.

²⁸ 29 USC 151-166.

²⁹ 7 USC 2 et seq.

³⁰ 18 USC 397-404.

³¹ 18 USC 408a, 408c.

³² 21 USC 301-392.

³³ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

grants of power a super-structure of powers governing currency, banking, deposit insurance, loans to agriculture, regulation of security prices, and to a large degree influencing economic conditions, through the control of credit.

Congress has established a complete monetary system for the United States and its dependencies. It has coined money and provided for its circulation. It has issued treasury notes and silver certificates and has authorized national banks to issue national bank notes. Through it the Federal Reserve Bank has issued Federal Reserve notes and Federal Reserve Bank notes. It has borrowed money, and issued bonds for an existing national debt of colossal proportions.³⁴

These powers have been extended to give authority for the establishment of the banking system of the United States, including the national banks, the Federal Reserve system, the Federal Farm Banks, the Federal Intermediate Credit Banks, the National Agriculture Credit Corporations, the Federal Home Loan Banks and the Federal Deposit Insurance Corporation as well as other banks.

The extent of the authority of Congress under its power to regulate currency may be measured by the fact that in 1933 it enacted an emergency banking act, which, among other provisions, appropriated to the government all outstanding gold bullion, gold coins, and gold certificates, and compelled all residents of the United States to deliver the same in exchange for legal currency of an equivalent face amount even though the price of gold represented by the certificates was in excess of the currency received. A few months later Congress enacted a resolution abrogating the gold clause in all public and private contracts. All of these powers were held to be within the authority of Congress, except that the government was not permitted to violate its existing contracts.³⁵

§ 48. Other Powers. Other powers expressed in the Constitution show a similar development. Having been defined in broad

³⁴ *Juillard v. Greenman*, 110 U. S. 421, 28 L. ed. 204; 12 USC 1 et seq., 21 et seq., 641 et seq., 1021 et seq., 1151 et seq., 1421 et seq., 1461 et seq.; 31 USC 31, 198 et seq., 408. On July 1, 1946, the debt of the Federal government was approximately two hundred and seventy billion dollars.

³⁵ *Nortz v. United States*, 294 U. S. 317, 79 L. ed. 907, 95 A. L. R. 1346; *Perry v. United States*, 294 U. S. 330, 79 L. ed. 912, 95 A. L. R. 1335; *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240, 79 L. ed. 885, 95 A. L. R. 1352.

outline only, each of them has been made effective through the enactment of statutes extending the general principles into a framework containing all the details necessary to create a practical operating governmental machine. Thus the bankruptcy clause has been supplemented by the Bankruptcy Act of 1898 creating courts of bankruptcy and defining their jurisdiction, and adopting rules and regulations for the distribution of the property of fraudulent or insolvent debtors.³⁷ The naturalization clause has been made effective by the establishment of a bureau of naturalization, by the enactment of laws regulating the naturalization of aliens, admitting them to citizenship in the United States, and has authorized such proceedings in state as well as Federal courts.³⁸ The provision giving Congress the power to establish post offices and post roads has enabled it to build a complete postal service, establishing post offices, appointing postmasters, providing for free mail delivery and maintaining a rural delivery service. It has charge of our foreign mail service. It maintains a postal money service, and acts as the agent of the Federal government in the sale of securities. Under this power Congress has erected buildings and has contracted for the transportation of the mail by sea, land and air.³⁹ Under the copyright and patents provisions, Congress has enacted a complete set of laws governing these subjects and protecting authors and inventors with exclusive rights to their respective writings and discoveries.⁴⁰

There are still other powers implemented by statutory enactment, but to complete the list would require a discussion of all the powers granted by the Constitution. There has not been a power of any import that has not been subject to the process of evolution.⁴¹

³⁷ 11 USC 1 to 101.

⁴⁰ 35 USC 1-31; 17 USC 1-43.

³⁸ 8 USC Chap. 9; *Campbell v. Gordon*, 6 Cr. 176, 3 L. ed. 190.

⁴¹ See generally the discussion of the powers of Congress, Chaps. 17 and 18, *infra*.

³⁹ 39 USC 1-801. See generally Chap. 17, *infra*.

CHAPTER 7

INTERPRETATION AND CONSTRUCTION

We are under a Constitution, but the Constitution is what the judges say it is.

—Charles Evans Hughes

§ 49. **Scope and Purpose.** Although the words interpretation and construction have slightly different meanings they have been used here synonymously. They are employed to describe the determination of the true meaning of the Constitution; to discover from the whole instrument and from other sources the intent of the people adopting it; to harmonize its different portions; to ascertain the powers granted and to make every grant or provision operative; and generally to secure and attain the ends desired from its operation as a system of government.¹ The growth of the Constitution through this process represents a definite evolution in our governmental structure. "Probably no writing except the New Testament, the Koran, the Pentateuch and Digest of Emperor Justinian," says Lord Bryce, "has employed so much ingenuity and labor as the American Constitution in sifting, weighing, comparing, illustrating, twisting and torturing its text."²

The purpose of these *interpretations and constructions* has been to apply the provisions of the rigid, inflexible instrument of 1787 and its amendments to new political, economic and social conditions that have arisen since that time. These decisions involve the most important problems in the field of constitutional law. In fact, our constitutional growth depends upon the construction of the Constitution, whether this construction relates to the Constitution itself or to the constitutionality of the Acts of Congress or to the acts of the several state legislatures, or other legislative bodies, or to the conduct of the various officers and departments of the government.

¹ 1 Bouvier Law Dict. 1657-1659.

² 1 Bryce, *American Commonwealth* (Rev. Ed.) 374-375.

In the determination of constitutional questions, the same rules of interpretation are employed as with other laws. The duty imposed upon the judiciary to discover the true meaning and intention of the lawgiver or the true meaning of the instrument is no less imperative than in the case of statutes. It is, however, a labor of greater delicacy and greater import because the principles involved underlie our social structure, effect more extensive interests which many times are national and international in scope, and are, therefore, vital as well as fundamental.³

§ 50. Who May Interpret. All persons who are charged with official duties, whether executive, legislative, or judicial, must necessarily interpret the Constitution in the performance of their duties. Every department of government invested with certain constitutional powers must, in the first instance, be the judge of its powers, or it could not act.⁴

Generally, however, the construction of constitutions rests with the courts, and the power to adjudge the constitutionality of a statute is exclusively in the province of the courts—Supreme Court of the United States; all Federal constitutional and legislative courts; state courts, including such inferior courts as justice courts and police courts, and commissions and officers of both Federal and state governments possessing judicial or quasi-judicial powers.⁵

³ *State v. Joseph*, 143 La. 428, 78 So. 663, L. R. A. 1918 E 1062.

⁴ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60.

⁵ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *Atkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 24 A. L. R. 1238; *Bickett v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915 F 898, Ann. Cas. 1917 D 517; *Commonwealth v. Atlantic Coast Line R. Co.*, 106 Va. 61, 55 S. E. 572, 117 Am. St. Rep. 982.

There has been considerable controversy over the origin of the power of the courts to declare acts of the legislature unconstitutional. It is now well settled, however, that the principle was generally recognized at the time the case of *Marbury v. Madison* was decided. *Bayard v. Singleton*, 1 N. C. 5

(decided May, 1787, held that an act of the legislature should stand as "abrogated and without any effect"); *Van Horne's Lessee v. Dorrance*, 2 Dall. 304, 1 L. ed. 391 (decided 1795, held a Pennsylvania Statute violated the State Constitution). See *Constitution of Pennsylvania* (1776) § 47 and *Constitution of Vermont* (1777) § XLIV; *Am. Charters and Const. & Organic Laws* Vol. 5, p. 3091 and Vol. 6, p. 3748 (created Council of Censors, one of whose duties it was "to inquire whether the Constitution has been preserved inviolate in every part"). See also *The Federalist* (1788) Nos. 78, 80 (Hamilton); *The Judiciary Act of 1789*, § 25 (here the power is directly recognized); *Warren, The Making of the Constitution*, 337 (precedent in New Hampshire).

Speaking of the authority of a county court to hold a statute unconstitutional, Justice Harlan remarked: "We do not admit that the county court was without power to hold it (a state statute repugnant to the 14th Amendment) to be unconstitutional and void. . . . The judge or judges of that court were obliged, by their oath of office, and in fidelity to the supreme law of the land to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the Constitution of the state notwithstanding." ⁶ Inferior courts and tribunals, however, should not assume such responsibility, except in the clearest and most imperative cases or where the constitutionality of a statute is unmistakable. ⁷

The courts of the United States have final authority in all cases involving the construction of the Federal Constitution, and whenever the rights of a party may be affected by a particular governmental act, whether it be an Act of Congress, or an act of a state legislature, or an act of an executive or judicial functionary either of the state or the United States, the common and final arbiter is the Supreme Court of the United States. ⁸

§ 51. Duty of Judiciary. It is the duty of the courts to enforce the provisions of the Constitution. While it is the province of the legislature to enact the laws, it is the obligation of the courts to determine their validity. If, therefore, the judges find that a statute is in accord with the Constitution, they must pronounce it valid. If they find that it is in contravention of the Constitution, or transgresses the authority vested in the legislature, they must pronounce it a nullity. This duty is so imperative that they cannot shrink from it without the judges violating their oaths of office, and it must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is drawn into question. ⁹

Speaking of the responsibility of the Supreme Court in considering an Act of Congress, Justice Sutherland wrote in a leading case: "The judicial duty of passing upon the constitutionality of an Act of Congress is one of great gravity and delicacy. The statute here in question," he said, "has successfully borne the scrutiny of the

⁶ *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419.

⁷ *City of New York v. McAneny*, 115 Misc. 433, 190 N. Y. S. 87; *In re Meng*, 96 Misc. 126, 159 N. Y. S. 535.

⁸ *Snead v. Central of Georgia Ry. Co.*, 151 Fed. 608.

⁹ *State v. Knight*, 169 N. C. 333, 85 S. E. 418, Ann. Cas. 1917 D 517. See also *Young v. United States*, 315 U. S. 257, 86 L. ed. 832.

legislative branch of the government which, by enacting it, affirmed its validity; and that determination must be given great weight. This court by an unbroken line of decisions from Chief Justice Marshall to the present day has steadily adhered to the rule in favor of the validity of an act of Congress until overcome beyond a reasonable doubt. But if by clear and indubitable demonstration, a statute is opposed to the Constitution, we have no choice but to say so. The Constitution by its own terms is the supreme law of the land, emanating from the people the repository of ultimate sovereignty under our form of government. A congressional statute on the other hand is the act of an agency of this sovereign authority, and, if it conflict with the Constitution, must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of judicial power—that power vested in the courts to enable them to administer justice according to law.”¹⁰

The extent to which the power of the Supreme Court should be exercised was defined by Justice Stone. “The power of courts to declare statutes unconstitutional,” he said, “is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only restraint upon our own exercise of power is our own self restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and the processes of democratic government.”¹¹

§ 52. Limitations Upon Construction Adopted by Supreme Court. The Supreme Court of the United States has developed for its own governance a series of rules under which it has limited the field of constitutional questions which can be pressed upon it for decision. These rules, as stated by Justice Brandeis, are as follows:

¹⁰ *Atkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785; *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160;

Ex parte Endo, 323 U. S. 283, 89 L. ed. 243.

¹¹ *United States v. Butler*, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914.

- (a) "The Court will not pass on the constitutionality of legislation in a friendly, non-adversary proceeding.
- (b) The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.
- (c) The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
- (d) The Court will not pass upon the validity of a statute on complaint of one who fails to show that he is injured by its operation.
- (e) The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
- (f) It is a cardinal principle that a statute will, if fairly possible, be construed so as to avoid a question of constitutionality."

Under the authority of these rules, the court in recent years, impressed with the great gravity and delicacy of its function in passing upon the validity of an Act of Congress, has refused to consider the constitutionality of many important enactments of that body. "It must be evident to anyone," quoting Justice Brandeis, "that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." ¹²

¹² *Ashwander v. Tennessee Valley Authority*, 270 U. S. 288, 80 L. ed. 688 (dissenting opinion of Justice Brandeis). See also Warren, Congress, The Constitution and the Supreme Court, 177 (former Senator Robert L. LaFollette, Sr., had proposed an amendment to the Constitution which provided that a statute, enacted by Congress and held unconstitutional by the Supreme Court, could be re-enacted by a two-thirds majority of Congress. Thereafter, it would be constitutional and forever free from attack, and Warren speaking of this proposal declared that "It would inevitably eventually destroy our

present form of government. Instead of a federal republic with limited powers, we would become a centralized government with unlimited powers. If American citizens wish to change to that form, should they not do so directly and consciously, rather than by the indirect method, embodied in a constitutional amendment lessening the powers of the Supreme Court." After almost every unpopular decision of the Supreme Court some proposal in some way limiting the power of the court is discussed. Former President Theodore Roosevelt adocated the recall of judicial decisions. See Warren, Supreme

§ 53. **Construction of Constitutions.** A constitution should be construed as the fundamental law, and consideration must be given to the fact that it affects the whole people. It should be interpreted so as to carry out the broad general principles of government which are expressly stated in its provisions.¹³ It should be construed in the light of its purpose, and in the light of the exigencies and conditions which it is intended to meet and deal with. It is necessary to view it as a permanent fundamental law intended to continue for a long period of time.¹⁴ It must be considered as an institution that is not static, but changing and progressive. "We must not be maneuvered," said Justice Griffith of the Supreme Court of Mississippi, "into positions which would view the Federal and state constitutions as sculptured idols, frowning with changeless features upon a changeless world."¹⁵ In the picturesque words of Justice Holmes: "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."¹⁶

The Supreme Court of the United States since the days of Marshall has, as a general rule, construed the Federal Constitution in a liberal and progressive manner. While safeguarding individual liberty, it has expanded the letter of the Constitution to meet the needs of a dynamic society.

§ 54. **Applicability of Rules of Statutory Construction.** Generally speaking, the principles applicable to the construction of a statute are equally applicable to the construction of a constitution, the fundamental purpose of such construction being to ascertain the intent of the people who adopted it and to give effect to such purpose.¹⁷ A constitution, however, is unlike a statute or a code

Court in United States History, page 743; *Coffman v. Breeze Corporations, Inc.* 323 U. S. 316, 89 L. ed. 264; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 89 L. ed. 1725; *Congress of Industrial Organizations v. McAdory*, 325 U. S. 472, 89 L. ed. 1741.

¹³ *Jenkins v. State Board of Elections*, 18 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

¹⁴ *Kerley v. Luhrs*, 44 Ariz. 208, 36 P. (2d) 549, 94 A. L. R. 1502.

¹⁵ *Dunn v. Love*, 172 Miss. 342, 155 So. 331, 92 A. L. R. 1323, aff'd *Doty v. Love*, 295 U. S. 64, 79 L. ed. 1303, 96 A. L. R. 1438.

¹⁶ *Bain Co. v. Pinson*, 282 U. S. 449, 75 L. ed. 482.

¹⁷ *State v. Joseph*, 143 La. 428, 78 So. 663, L. R. A. 1918 E 1062; *State v. Leslie*, 100 Mont. 449, 50 P. (2d) 959, 101 A. L. R. 1329.

in that it establishes a framework of government and declares only general principles, and it is not to be interpreted with the strictness of a statute. Constitutional provisions should receive a broader and more liberal construction than statutes.¹⁸ Mere technical rules, or literal construction which would defeat the principles of government or the objects for which the Constitution was adopted, are not to be applied. The words and terms of a Constitutional provision are to be interpreted and understood in their most natural and obvious meaning. The courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed. Due regard must be given to the broader object and scope of a constitution as a charter of government.¹⁹

The fundamental distinction between the construction of these two classes of instruments lies in the fact that a constitution is a primary law and is permanent, while a statute is a secondary law, is subsequent in time, and is intended to be temporary in effect.²⁰

§ 55. Construction as Entirety. The Constitution must be construed as an entire instrument, and all parts must be harmonized if possible. Every word and every part should be given effect. "In expounding the Constitution," asserted Chief Justice Taney, "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added—Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."²¹

It is the duty of the Court to have recourse to the whole instrument in order to ascertain the meaning of any particular provision, and no part should be treated as superfluous. One provision cannot be separated from the others or considered alone, but all provisions bearing upon any particular subject must be considered together so as to carry into effect the purpose of the instrument.²²

¹⁸ Riley v. Carter, 165 Okla. 262; 25 P. (2d) 666, 88 A. L. R. 1018.

¹⁹ State v. City of St. Louis (Mo.), 11 S. W. (2d) 1010; Platte Valley Public Power & Irrigation Dist. v. Lincoln County, 144 Neb. 584, 14 N. W. (2d) 202, 155 A. L. R. 412; Department of Finance v. Dishman, 298 Ky. 545, 183 S. W.

(2d) 540, 155 A. L. R. 1429.

²⁰ Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C 200.

²¹ Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; Wright v. United States, 302 U. S. 583, 82 L. ed. 439.

²² Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088; Finerty v. First

If there is any repugnancy between provisions, the Court must bring them into agreement. All parts are of equal moment and are equally binding upon the courts.²³ "If, in any case, the plain meaning of a provision, not contradicted by any other provision," remarked Chief Justice Marshall, "is to be disregarded it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."²⁴

Where there is a conflict between a general and a special provision, the special provision must prevail in respect to the subject under consideration. The special provision will be construed as a limitation upon the grant. For example, a declaration of rights in general terms will be limited and controlled by a subsequent provision which declares in specific terms what the character and qualifications of the general rights previously declared shall be.²⁵⁻²⁶

§ 56. Uniformity of Construction. The Constitution should receive a consistent and uniform construction so that it will not be made to mean one thing at one time and another thing at another time even though circumstances and conditions may have so changed as to make a different rule seem desirable.²⁷ A constitution does not change with the varying tides of public opinion and desire. This does not mean, however, that the Constitution has not grown in its application to new conditions. Being a grant of

Nat. Bank, 92 Okla. 102, 218 Pac. 859, 32 A. L. R. 1326; State v. State Election Board, 169 Okla. 363, 36 P. (2d) 20, 94 A. L. R. 1007; Livermore v. Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; Blackfoot Copper Min. Co. v. Tingley, 34 Utah 369, 98 Pac. 180, 131 Am. St. Rep. 850.

²³ Marbury v. Madison, 1 Cr. 137, 2 L. ed. 60; Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 26 S. W. 1025, 32 L. R. A. 157; Williams v. United States, 289 U. S. 553, 77 L. ed. 1372; Myers v. United States, 272 U. S. 52, 71 L. ed. 160.

²⁴ Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

²⁵⁻²⁶ Wheeler v. Herbert, 152 Cal. 224, 92 Pac. 353; Hope v. New Orleans, 106 La. 345, 30 So. 842; Norton v. Bradham, 21 S. C. 375.

²⁷ Travelers Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A. L. R. 802; State v. Clausen, 142 Wash. 450, 253 Pac. 805; State v. Showalter, 159 Wash. 519, 293 Pac. 1000; State v. Stewart, 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918 D 1101; Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481 (dissenting opinion of Justice Sutherland); State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858, 157 A. L. R. 441.

powers to the government, its language is general and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of its powers. Under the theory of the conservative school the courts have held that, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. Those things which are within the grants of power are still within them and those things not within them remain excluded.²⁸

Speaking of the uniformity of construction in its relation to the commerce clause, Justice Brewer asserted: "Constitutional provisions do not change, but their operations extend to new matters as modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad and the steamship (bus and airplane). Just so it is with the grant to the national government over interstate commerce. The Constitution has not changed. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of commerce which the future may develop."²⁹ Justice McKenna reached a more positive conclusion. "It may be that constitutional law," he said, "must have a more fixed quality than customary law or that it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action. This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law."³⁰

§ 57. Liberality of Construction. The creation of a basic framework of government through the announcement of general principles in a written constitution was not intended to be a limitation upon the healthful growth of the Constitution or an obstruction of its expansion to meet new conditions.³¹ "Constitutions are

²⁸ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737.

²⁹ *Re Debs*, 158 U. S. 564, 39 L. ed. 1092.

³⁰ *Merrick v. N. W. Halsey &*

Co., 242 U. S. 568, 61 L. ed. 498.

³¹ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Helvering v. Davis*, 301 U. S. 619, 81 L. ed. 1307, 109 A. L. R. 1319.

not made for existing conditions only," declared Chief Justice Brown of the Supreme Court of Minnesota, "nor in the view that the state of society will not advance or improve but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."³²

The Federal courts, as well as the courts of the various states, have uniformly shown a determination to give the Constitution of the United States such flexibility as they considered necessary for the development of the nation and for the protection of the public interest.³³ This does not mean that the Constitution has grown by being violated whenever its provisions stood in the way of national progress; but it does mean that this fundamental law, by the enlightened foresight of its framers, was made to be an intelligent guide and chart, not a mere list of obstacles.³⁴ It means further that in construing the general language or policy of the Constitution, the courts must consider not only the conditions and problems existing at the time of the adoption of the Constitution, but also the changed social, economic, and governmental conditions existing at the time of the interpretation, as well as the problems which those changes have produced.³⁵ Under the necessity of solving present day problems, many acts are sustained which would not have been sustained one hundred years ago, since social and industrial conditions and political theories are constantly changing.³⁶ What is critical and urgent changes with the times.³⁷ The final test of flexibility is that the Constitution should be construed and interpreted so as not to render impotent or inoperative but to preserve and make effective the sovereign will of the nation.³⁸⁻³⁹

³² *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 9 Ann. Cas. 270.

³³ *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 9 Ann. Cas. 270; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. ed. 303, 54 A. L. R. 1016; *Gaiser v. Buck*, 203 Ind. 9, 179 N. E. 1, 82 A. L. R. 1348.

³⁴ *State v. Missouri Pac. R. Co.*, 96 Kan. 609, 152 Pac. 777, Ann. Cas. 1917 A 612, aff'd 248 U. S. 276, 63 L. ed. 239, 2 A. L. R. 1589.

³⁵ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

³⁶ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

³⁷ *Helvering v. Davis*, 301 U. S. 619, 81 L. ed. 1307, 109 A. L. R. 1319. See also *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 316, 81 L. ed. 255.

³⁸⁻³⁹ *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *Jenkins*

§ 58. **Interpretation of Granted Powers.** In the sphere of its operation the Constitution of 1787 established a government of limited, enumerated, and delegated powers, and the Federal government can exercise only such authority as is expressly conferred upon it or such as can reasonably be implied from the powers expressly granted.⁴⁰ These prescribed limits cannot be transcended even though the end may seem desirable, and Congress cannot under the pretext of executing delegated power pass laws for the accomplishment of objects not entrusted to the Federal government. Any act ostensibly enacted under a power granted by the Constitution and not naturally and reasonably adapted to the effective exercise of such power is invalid, and cannot be enforced.⁴¹

The courts will not create powers or read into the Constitution provisions which are not there merely to aid the government in solving present day problems or in dealing with existing conditions. An emergency, however, may be the occasion for the exercise of a power already existing, even though such power had been dormant or had not been exercised before. "While emergency does not create power," asserted Chief Justice Hughes, "emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."⁴²

The authority of the Federal government to exercise any particular power must be derived from the Constitution. In the event of any question recourse must be had to it to determine whether the authority exists either in the form of an express grant or by necessary implication.⁴³

v. State Board of Elections, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862; Missouri v. Holland, 252 U. S. 416, 64 L. ed. 641, 11 A. L. R. 984.

⁴⁰ United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914; Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, 79 L. ed. 1468; Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947.

⁴¹ Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 39 A. L. R.

229. For the views of the liberal school see Chap. 3, §§ 25, 27, *supra*.

⁴² Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; Hunter v. Colfax Consol. Coal Co., 175 Iowa, 245, 154 N. W. 145, L. R. A. 1917 D 15, Ann. Cas. 1917 E 803.

⁴³ Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A. L. R. 1010; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737.

Congress has full discretion to employ such means and adopt such methods as it may consider desirable and necessary to carry the expressed or granted powers into execution. "While the powers are rigidly limited to the enumeration of the Constitution," said Justice Sutherland, "the means which may be employed to carry the powers into effect are not restricted. . . . Thus it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution all ways are closed."⁴⁴ The means referred to by Justice Sutherland relate to the implied powers of the Constitution.

§ 59. Doctrine of Implied Powers. Chief Justice Marshall announced the doctrine of implied powers in the leading case of *McCulloch v. Maryland* in 1819 in a momentous decision sustaining the power of Congress to incorporate a national bank. After stating that the Constitution could not contain an accurate detail of all the subdivisions which its great powers might require, he continued: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"⁴⁵ The words which have been italicized have been accepted as the classic definition of an implied power. Briefly it means that the authority which is reasonably appropriate and relevant to the exercise of a granted power is to be considered as accompanying the grant.⁴⁶

The implied powers are necessary to render the provisions of the Constitution effective, and it is universally recognized that they are as much a part of the Constitution as the powers which are ex-

⁴⁴ *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160.

⁴⁵ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

⁴⁶ *Marshall v. Gordon*, 243 U. S. 521, 61 L. ed. 881, L. R. A. 1917 F 279, Ann. Cas. 1918 B 371.

pressed.⁴⁷ A power may be implied whenever it is necessary to give effect to one expressly granted.⁴⁸

An implied power may be implied from another implied power. Speaking of this doctrine, Justice Brandeis remarked: "The distinction sought to be made between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus the Constitution confers upon Congress the express power to establish post offices and post roads. From this is implied the power to acquire land for post offices in the several states, and as an incident of this implied power to acquire land, the further power is implied to take it by the right of eminent domain."⁴⁹

Many of the great powers of the Constitution are implied powers. In fact, in the whole Constitution, according to Justice Johnson, there is not a grant of power which does not carry with it others, not expressed, but vital to its exercise.⁵⁰

§ 60. Common Law. In interpreting the Constitution, recourse may be had to the common law of England in force in the United States at the time of the Revolution. Many principles of government were adopted directly from this source and it has been presumed that the statesmen who wrote the Constitution adopted these principles with the fixed technical meaning they had acquired in legal and constitutional history. "The interpretation of the Constitution," said Justice Brewer, "is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."⁵¹ To which statement Chief Justice Taft has added: "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the convention, who submitted it to ratification of the conventions of the thirteen states, were born and

⁴⁷ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737.

⁴⁸ *MacKenzie v. Hare*, 239 U. S. 299, 60 L. ed. 297, Ann. Cas. 1916 E 645.

⁴⁹ *Ruppert v. Caffey*, 251 U. S. 264, 64 L. ed. 260.

⁵⁰ *Anderson v. Dunn*, 6 Wheat, 204, 5 L. ed. 242.

⁵¹ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737.

brought up in the atmosphere of the common law, and thought and spoke its vocabulary."⁵²

The common law as it has developed in the United States since the adoption of the Constitution is also a source of interpretation. While there is no common law of the United States, in the sense of a national customary law, the courts of the United States enforce the law as they find it in the states and apply the common law as a national institution, in the interpretation of the Constitution. This is consonant to the true philosophy of our historic institutions, which have been developed by a progressive growth, and by wise adaptation to new conditions of forms and processes found necessary to give expression to modern ideas of government. "Federal common law implements the Federal Constitution and statutes, and is conditioned by them," Justice Jackson declared. "Within these limits, Federal Courts are free to apply the traditional common law technique of decision and to draw upon all the sources of the common law."⁵³

Recourse to the common law may be had only for interpretation and construction. It cannot overrule any of the provisions of the Constitution, or alter or modify the intention of the founders of our government. "Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly these rules have no restrictive effect in respect of any constitutional grant of governmental power—though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury."

⁵² *Grossjean v. American Press Co.*, 297 U. S. 233, 80 L. ed. 660.

⁵³ *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487; *Funk v. United States*, 290 U. S. 371, 78 L. ed. 369, 93 A. L. R. 1136; *State ex rel. Powell v. State Bank*, 90 Mont. 539, 4 P. (2d) 717, 80 A. L. R. 1494; *Calder v. Ball*, 3 Dall. 386, 1 L. ed. 648; *Bronson v. Syverson*, 88 Wash. 264,

152 Pac. 1039; *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303, L. R. A. 1918 E 581; *Dimick v. Schiedt*, 293 U. S. 474, 79 L. ed. 603, 95 A. L. R. 1150; *Ex parte Grossman*, 267 U. S. 87, 69 L. ed. 527, 38 A. L. R. 131; *D'Oench, Duhine & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447, 86 L. ed. 956 (concurring opinion of Justice Jackson).

No common law rule can be invoked which is unsuited to our civil and political conditions.⁵⁴

§ 61. **Construction by Nonjudicial Bodies.** A construction of the Constitution by the legislative and executive departments and other agencies of the government will usually be accepted as correct by the judicial department. This rule was expressed by Justice Sanford in the following language: "The views which we have expressed as to the construction and effect of the constitutional provision here in question," he observed, "are confirmed by the practical construction that has been given to it by the presidents through a long course of years in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."⁵⁵ Construction placed upon a constitution by long continued custom and usage applies only in case of ambiguity and doubt. Plain and unambiguous provisions cannot be varied by legislative, executive or departmental construction.⁵⁶

§ 62. **Extraneous Aids to Construction.** The courts may resort to extraneous aids in construing and interpreting a constitution. In order to ascertain the intent of the framers of the Con-

⁵⁴ *Grossjean v. American Press Co.* 297 U. S. 233, 80 L. ed. 660. See also *Continental Illinois Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 79 L. ed. 1110; *Funk v. United States*, 290 U. S. 371, 78 L. ed. 369, 93 A. L. R. 1136; *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303, L. R. A. 1918 E 581.

⁵⁵ *Pocket Veto Case*, 279 U. S. 655, 73 L. ed. 894, 64 A. L. R. 1434; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 14 Ann. Cas. 606. See also *Great*

Northern Ry. Co. v. United States, 315 U. S. 262, 86 L. ed. 836; *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 86 L. ed. 1387; *Sioux Tribe of Indians v. United States*, 316 U. S. 317, 86 L. ed. 1501. See also *Chadwick v. Crawfordsville*, 216 Ind. 399, 24 N. E. (2d) 937, 129 A. L. R. 469; *State v. Emery*, 224 N. C. 581, 21 S. E. (2d) 853, 157 A. L. R. 441; *Boehm v. Commissioner of Internal Revenue*, — U. S. —, 90 L. ed. — (treasury regulations long continued without substantial change have the effect of law).

⁵⁶ *State v. Carter*, 167 Okla. 32, 27 P. (2d) 617, 91 A. L. R. 1497; *Fairbanks v. United States*, 181 U. S. 283, 45 L. ed. 862.

stitution, they may look to the history of the times and examine into the law, conditions, usages and affairs existing at the time of the adoption of the Constitution.⁵⁷ They may consider the new or amended plan of government involved. They may presume that words and phrases were used in their plain, natural and usual sense and import.⁵⁸ They may construe provisions taken from former constitutions in accordance with their previous interpretation.⁵⁹ They may give weight to the age of constitutional provisions, and to the fact that they have been acquiesced in and enforced as valid for a long period of years without the constitutionality being questioned.⁶⁰

They may refer to the proceedings and debates of the constitutional convention, to the Federalist papers and to the opinions of constitutional writers.⁶¹ They may give extra weight to the opinions of attorneys general, which are always regarded as highly persuasive. But opinions expressed by individual members of the Senate or the House conflicting with the explicit statements of the meaning of the statutory language by committee reports and members of the committee on the floor of the Senate and House will not be taken as persuasive of the congressional purpose in the enactment of a statute.⁶²

In considering the validity or invalidity of a statute, the courts will look to its provisions, rather than to its practical effect in any given instance.⁶³ The inquiry will be confined to the law itself

⁵⁷ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 86 L. ed. 836.

⁵⁸ *City of Pasadena v. Railroad Commission of California*, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425.

⁵⁹ *City of Wichita Falls v. Williams*, 119 Tex. 163, 26 S. W. (2d) 910, 79 A. L. R. 704; *Ex parte Schriber*, 19 Idaho 531, 114 Pac. 29, 37 L. R. A. (N. S.) 693.

⁶⁰ *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A 696, Ann. Cas. 1916 E 1097; *Douglas v. Noble*, 261 U. S. 165, 67 L. ed. 590.

⁶¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903. See also *Chadwick v. Crawfordsville*, 216 Ind. 399, 24 N. E. (2d) 937, 129 A. L. R. 469.

⁶² *State v. Magee Pub. Co.*, 20 N. M. 455, 224 Pac. 1028, 38 A. L. R. 142; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 86 L. ed. 726.

⁶³ *State v. Montfort*, 93 Wash. 4, 159 Pac. 889, L. R. A. 1917 B 801; *State v. Butler*, 70 Fla. 102, 69 So. 771.

and to the facts of the case, and the specific ground upon which the statute is attacked must be definitely pleaded and proved.⁶⁴

The courts may also consider the following circumstances and conditions. They may consider the purpose to be accomplished by the act.⁶⁵ They may consider the old law and the evils to be remedied.⁶⁶ They may examine journals of the legislature in determining whether the act was passed in due form, but no evidence will be received to contradict the journals.⁶⁷ They may consider the legislative history of an act, but the motives of the legislature or the wisdom of congressional policy will not be inquired into.⁶⁸ Evidence of fraud, bribery and corruption in enacting legislation will not be considered.⁶⁹ A statute will not be declared void on account of statements found in the preamble as the preamble is merely introductory.⁷⁰ A statute will not be declared void on considerations going to its propriety, or expediency, as these are for legislative determination.⁷¹

Likewise, a statute will not be held unconstitutional merely because it is unjust and repugnant to the general principles of

⁶⁴ *State v. Howell*, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916 A 1231; *Almand v. Pate*, 143 Ga. 711, 85 S. E. 909; *United States v. Carolene Products Co.*, 304 U. S. 144, 82 L. ed. 1234; *Singer v. United States*, 323 U. S. 338, 89 L. ed. 285.

⁶⁵ *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497.

⁶⁶ *Davis v. Phipps*, 191 Ark. 298, 85 S. W. (2d) 1020, 100 A. L. R. 1110.

⁶⁷ *Common Council, Detroit v. Board of Assessors*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America*, 315 U. S. 521, 86 L. ed. 1004; *Harrison v. Northern Trust Co.*, 317 U. S. 476, 87 L. ed. 407; *Carolene Products Co. v. United States*, 323 U. S. 18, 89 L. ed. 15; *Integration of Bar Case*, 244 Wis.

8, 11 N. W. (2d) 604, 151 A. L. R. 586.

⁶⁸ *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263; *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 86 L. ed. 855; *De Zon v. American President Lines*, 318 U. S. 660, 87 L. ed. 1065; *McLean Trucking Co. v. United States*, 321 U. S. 67, 88 L. ed. 544; *Billings v. Truesdell*, 321 U. S. 542, 88 L. ed. 917; *Glass City Bank v. United States*, — U. S. —, 90 L. ed. —.

⁶⁹ *State v. Clausen*, 108 Wash. 133, 183 Pac. 115.

⁷⁰ *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100.

⁷¹ *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 1 Ann. Cas. 561; *Glass City Bank v. United States*, — U. S. —, 90 L. ed. —.

justice, liberty, or right not expressed in constitutional provisions, or because it violates the spirit of our institutions or impairs rights which it is the object of a free government to protect, as to do so would subject the great powers of the legislature to abuse. If legislative policy is couched in vague language easily susceptible of one meaning as well as another in the common speech of men, the courts will not stifle such a policy by a pedantic or grudging process of construction, but they may not draw upon some unexpressed spirit outside of the bounds of the normal meaning of words used in a statute. But public policy will be ascertained by reference to the laws and legal precedents and not from general considerations of public interest.⁷²

Generally speaking, the courts, in order to discover the true meaning of a doubtful constitutional provision, will resort to extraneous aids only when an ambiguity exists which cannot be cleared up by a consideration of the Constitution itself.⁷³ "If the words convey a definite meaning which involves no absurdity," asserted Justice Lamar, "nor any contradiction of the other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted, and neither the court nor the legislature have the right to add to it or take from it."⁷⁴

§ 63. Presumption of Constitutionality. Acts of Congress and statutes of state legislatures, ordinances, and orders of administrative bodies, exercising legislative powers, are presumed to be constitutional, although this presumption is not conclusive.⁷⁵ It merely means that every reasonable presumption will be made in favor of constitutionality,⁷⁶ and an act fair on its face may be

⁷² Moore v. Georgetown, 127 Ky. 409, 32 Ky. L. 323, 105 S. W. 905, 128 Am. St. Rep. 349; Addison v. Holly Hill Fruit Products, 322 U. S. 607, 88 L. ed. 1488; Muschany v. United States, 324 U. S. 49, 89 L. ed. 744.

⁷³ Ex parte Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914 A 152; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597.

⁷⁴ Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1060; Greenlee County v. Laine, 20 Ariz. 296, 180 Pac. 151.

⁷⁵ South Carolina State Highway Department v. Barnwell Bros., 262

U. S. 325, 67 L. ed. 1004; Pacific Telephone & Telegraph Co. v. Wallace, 158 Ore. 210, 75 P. (2d) 942.

⁷⁶ West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330. See also Kentucky v. Reeves, 309 U. S. 83, 84 L. ed. 590, 125 A. L. R. 1383 (doctrine of reasonable doubt will be construed strongly in favor of state tax legislation); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 84 L. ed. 1368 (expresses same doctrine in respect to orders and regulations of administrative bodies).

shown to be void and unenforceable on account of its actual operation.⁷⁷ "An act should not be set aside by implication," said Justice Brown of the Supreme Court of North Carolina. "A constitution," he said, "should not receive a technical construction, as if it were an ordinary instrument. It should be interpreted so as to carry out the general principles of the government and not defeat them."⁷⁸ Unconstitutionality, therefore, will be avoided wherever possible and the question of constitutionality will not be considered unless it is imperative to the decision of the case.⁷⁹

The courts will not take evidence as to unconstitutionality, but will determine the constitutionality or unconstitutionality of an act from matters that appear on the face of the act itself, or from facts of which the judges may take judicial notice.⁸⁰ They will assume that the legislative body acted advisedly and in good faith with full knowledge of existing and underlying facts and conditions upon which the legislation is based, and that it intended to conform to the limitations defined by the Constitution. "To the legislature no less than to the courts is committed the guardianship of deeply cherished liberties," observed Justice Frankfurter, and "to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."⁸¹

§ 64. Effect of Decision. A decision against the constitutionality of a statute makes the statute entirely null and inoperative so long as the decision stands, and the invalidity dates from the time of enactment.⁸² It confers no rights or duties and affords no protection, and there is no requirement or necessity of complying with it. But the statute, having been in existence and operation, may have consequences that cannot be entirely ignored. There

⁷⁷ Great Northern Ry. Co. v. Washington, 300 U. S. 154, 81 L. ed. 573.

⁷⁸ Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247.

⁷⁹ United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 194; Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. ed. 688 (opinion of Justice Brandeis).

⁸⁰ Great Northern Ry. Co. v. State, 184 Wash. 648, 52 P. (2d) 1274.

⁸¹ Becker Steel Co. v. Cummins, 296 U. S. 74, 80 L. ed. 54; Miners School Dist. v. Gobitis, 310 U. S. 586, 84 L. ed. 1375, 127 A. L. R. 1493.

⁸² State v. Greet, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298.

may be questions of relations, of vested rights, of status, of prior determinations deemed to have finality, and of public policy which cannot be erased by the new judicial declaration. These may demand further examination by the court.⁸³

A statute may be partly unconstitutional and the remainder valid provided the parts can be separated. In such event, that part that is constitutional will be enforced, provided the legislature so intended. "A statute bad in part," declared Justice Brandeis, "is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." The courts have held or assumed that a declaration in a statute that the invalidity of a portion or a part shall not affect the remainder is valid.⁸⁴

§ 65. Judicial Precedents. A judicial precedent is a juridical authority to be followed in a court of law. Stated somewhat differently, it is a judicial decision that serves as a rule for future determination in identical, similar or analogous cases. These precedents are of great importance in our judicial system in determining the weight to be given to the decisions of the Supreme Court of the United States, as well as other Federal courts, and the weight to be given the decisions of the courts of the various states in their relation with each other and with the Federal courts.

In cases arising under the Federal Constitution and laws, the Federal courts will follow the decisions of the Supreme Court, the Circuit Courts of Appeal and other Federal courts and tribunals.⁸⁵ Likewise, the courts of the states will be imperatively bound to follow the decisions of the Supreme Court of the United States,

⁸³ *City of Montpelier v. Gates*, 106 Vt. 116, 170 Atl. 473; *Gormy v. Trustees of Milwaukee County Orphans Board*, 93 F. (2d) 107, 115 A. L. R. 1000; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178. See Chap. 1, § 5, *supra*.

⁸⁴ *Dorchy v. Kansas*, 264 U. S. 286, 68 L. ed. 686; *Williams v. Standard Oil Co.*, 278 U. S. 235,

73 L. ed. 287. See also *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160 and *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, 82 L. ed. 936, 115 A. L. R. 105.

⁸⁵ *Wright v. Columbus, H. V. & A. R. Co.*, 176 U. S. 481, 44 L. ed. 554.

overruling, if necessary, their own previous decisions to the contrary.⁸⁶

In cases arising under state constitutions and laws, the state courts must follow the decisions of the state Supreme Court, and the judges must give effect to these decisions implicitly without regard to their previous decisions or their personal views of the law.⁸⁷ Likewise, the Federal courts will follow the construction placed upon the state constitution by the highest appellate state court, save only in so far as questions of Federal law may be involved.⁸⁸ Courts of other states will follow the decisions of the highest courts of a sister state, holding a statute of the sister state to be valid or invalid.⁸⁹ If the question involved, however, concerns the validity of the statute under the Constitution and laws of the United States, courts of other states will be bound by the decision of the Supreme Court of the United States, if there shall be any, upon the point under consideration. Otherwise, they will be at liberty to exercise their own judicial determination.⁹⁰

§ 66. Stare Decisis. This phrase means, literally, "to stand by decided matters." It is the doctrine of following rules or principles laid down in previous judicial decisions, unless they contravene the ordinary principles of justice. The doctrine is of great importance in construing a constitution, since it must receive an unvarying construction, subject of course to the power of the Supreme Court to overrule any decision which it considers erroneous. This rule adds uniformity and stability to constitutional construction, because it provides that an interpretation once made shall not be abandoned without grave and considered reasons.⁹¹

Stare decisis is not, however, a universal inexorable command. It has only a limited application in the field of constitutional law.⁹²

⁸⁶ Constitution of United States, Art. VI, § 2.

⁸⁷ *Palmer v. Lawrence*, 5 N. Y. 89; *People v. McGuire*, 45 Cal. 56.

⁸⁸ *Sanford v. Poe*, 69 Fed. 546, 60 L. R. A. 641; *Leighlan v. Young*, 52 Fed. 439, 18 L. R. A. 266; *Rosenthal v. New York Life Ins. Co.*, 304 U. S. 263, 82 L. ed. 1330; *United States v. Waddill, Holland & Flinn*, 323 U. S. 353, 89 L. ed. 294.

⁸⁹ *McDowell v. Lindsay*, 213 Pa. 591, 63 Atl. 130.

⁹⁰ *Stoddard v. Smith*, 5 Bin. (Pa.) 355.

⁹¹ *McCulley v. State*, 102 Tenn. 509, 58 S. W. 134, 46 L. R. A. 567; *Riley v. Carter*, 164 Okla. 262, 25 P. (2d) 666, 88 A. L. R. 1018.

⁹² *St. Joseph Stock Yards Co. v. United States*, 299 U. S. 38, 80 L. ed. 1033.

Justice Reed, in a leading case, has explained the practice of the Supreme Court. "We are not unmindful of the desirability of continuity of decision in constitutional questions," he declared. "However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, when correction depends upon amendment and not upon legislative action this court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than interpretation of the Constitution to extract the principle itself."⁹³

And Justice Brandeis, in recording his dissent in another case, observed, "In cases involving the Federal Constitution where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."⁹⁴

In the last analysis it may be said that the rule is moral and intellectual rather than arbitrary or inflexible.⁹⁵ Too rigid fidelity to the rule of stare decisis, when conditions and circumstances have changed or better reasoning should prevail, would cause the courts to stand in the way of progress.⁹⁶

⁹³ *Smith v. Allwright*, 321 U. S. 649, 88 L. ed. 987, 151 A. L. R. 1110.

⁹⁴ *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 406, 76 L. ed. 823 (dissenting opinion Justice Brandeis).

⁹⁵ *State v. Mellenberger*, 163 Ore. 233, 95 P. (2d) 709, 128 A. L. R. 1506.

⁹⁶ *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82

L. ed. 673; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330 ("The importance of the question," observed Chief Justice Hughes in overruling the *Adkins* case, "makes it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration"); *Burnet v. Coronado Oil & Gas Co.* 285 U. S. 406, 76 L. ed. 823.

CHAPTER 8

CONVENTIONS OF THE CONSTITUTION, USAGES, INHERENT POWERS

Even Constitutional Power, when the text is
doubtful, may be established by usage.

—Justice Frankfurter

§ 67. Definition. Conventions and usages, which have been factors in the growth of the Constitution, consist of rules and usages covering matters which are within the general scope of the Constitution, but have not been dealt with in express words or provisions and by the creation of machinery for the accomplishment of the purposes and powers of the Constitution. In some cases the powers of the Constitution and the meaning of its provisions have been modified or changed, although the words of the clauses remain the same.¹

A usage is a long continued practice, or a customary mode of procedure. A convention is a custom, usage or opinion that has become so well established that it has resulted in a general agreement or concurrence in its acceptance as a permanent inflexible practice or procedure. More briefly, a convention may be said to be a fixed usage.

In reference to the Constitution, a usage is a practice or custom which has been in use sufficiently long and generally to be recognized as a part of administrative procedure. A convention is a usage which has added to or modified a principle, power or procedure as defined by the Constitution. In effect it is more in the nature of a statute implementing the Constitution or a constitutional decision. It is more permanent and more inflexible than a usage, and is recognized more specifically as a part of our constitutional government.²

¹ *Inland Waterways Corp. v. Young*, 309 U. S. 517, 84 L. ed. 52, 119, 136, 71 L. ed. 160; *Pocket Veto Case*, 279 U. S. 655, 688-690, 901; *United States v. Midwest Oil Co.*, 236 U. S. 459, 59 L. ed. 673; 73 L. ed. 894, 64 A. L. R. 1434.
² See 2 *Bouvier Law Dict.* (8th Ed.) 3377-3378.

§ 68. **Power of the People.** The right of the people to add to or modify the Constitution through established conventions and usages is not a power defined or expressly granted by the Fundamental Law of 1787, and yet it cannot be doubted that such power exists, as one of the rights of sovereignty.³ In various cases the courts have recognized conventions and usages and the right of the people to effect a change in the meaning of their written Constitution by the process of long and continuous interpretation followed by action. In 1933 Judge Cuff of the Supreme Court of Kings County, New York, in discussing the change effected in the Electoral College, resulting in the popular election of the President and Vice President, defined this power in the following language: "Free people have the right to effect a change in the meaning of their written constitution," he said, "by the process of long and continuous interpretation followed by action, which interpretation and action are contrary to the exact wording of the organic law. Marked change in conditions, non-existence of reasons for provisions, official action coupled with universal public acceptance and co-operation repeated over a long period of time . . . warrant giving to words a meaning interpretive of those new conditions and actions, when the new meaning accords fully and completely with the understanding that the public has had for a long time. That is especially so, when a strict interpretation of the language is fraught with unnecessary dangers that would, without doubt, menace the peace and well being of the nation and might even rise to proportions that would challenge the very existence of the republic."⁴

Chief Justice Hughes, speaking for the Supreme Court affirmed the same doctrine when he declared: "The practical construction of Article I, Sec. 4, is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the

³ *Smiley v. Holm*, 285 U. S. 355, 76 L. ed. 795; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869.

⁴ *Thomas v. Cohen*, 146 Misc. 836, 262 N. Y. S. 320. See also *Stuart v. Laird*, 1 Cr. 299, 2 L. ed. 115, 118; *Fairbanks v. United*

States, 181 U. S. 307, 45 L. ed. 872; *Cooley v. Port Wardens*, 12 How. 315, 13 L. ed. 1003; *Grisar v. McDowell*, 6 Wall. 364, 18 L. ed. 863, 868; *Ex parte Richard Quirin*, 317 U. S. 1, 87 L. ed. 3.

case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny."⁵

This power of the people to change their Constitution has been vital to its existence. Bryce, the great English authority on our institutions, believed that our government could not have existed without constant change through this method. "The American Constitution," he remarked, "has stood because it has submitted to a process of constant, though sometimes scarcely perceptible change, which has adapted it to the conditions of a new age. The solemn determination of a people enacting a fundamental law by which they and their descendants shall be governed cannot prevent that law, however great the reverence they continue to profess for it, from being worn away in one part, enlarged in another, modified in a third by the ceaseless action of influences playing upon the individuals who compose the people. Thus the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit."⁶

§ 69. President by Succession. The Constitution provides for the choosing of a president through an election, either by electors or by the House of Representatives. Convention has added the additional method of succession from the Vice Presidency. The growth of this convention is one of the most apt examples of the modification of the Constitution through the process of the evolution of a principle or practice of government.

The Constitutional provisions are:

"In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same may devolve upon the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."⁷

⁵ Smiley v. Holm, 285 U. S. 355, 76 L. ed. 395.

⁶ 1 Bryce, American Commonwealth (Rev. Ed.) 400. See also

Wilson, Constitutional Government in United States, 20-23.

⁷ Constitution of the United States, Art. II, § 1, cl. 6.

"The Senate shall choose . . . a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States."⁸

The Constitution in no place provides for the elevation of the Vice President to the Presidency in the event of the death, resignation or inability of the President to discharge the duties of the office. In fact, a careful reading of widely different sections of the Constitution implies only that the Vice President, as Vice President, shall perform the duties of the office of President, and it is clear that such was the intention of the framers of the Constitution.

The convention that the Vice President succeeded to the Presidency began in 1841 upon the death of William Henry Harrison. President Harrison was the first President to die in office. John Tyler had been elected Vice President and had assumed office on March 4, 1841. President Harrison died on April 4th. The cabinet met the same day and notified Tyler of the President's death, addressing him as Vice President of the United States. On April 6, Tyler took the oath of office as President as follows:

"I do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect and defend the Constitution of the United States."

This oath was taken before the Chief Judge of the Circuit Court of the District of Columbia, who added the following certificate:

"I, William Cranch, Chief Judge of the Circuit Court of the District of Columbia, certify that the above-named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and offices of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me."

On April 9, Tyler issued his first proclamation to the people of the United States, referring to himself as the President of the Confederacy and as the Chief Magistrate. Congress convened on May 31 and, after some debate, addressed Tyler as President of the United States. Tyler always asserted himself as President, drew

⁸ Constitution of the United States, Art. I, § 3, cl. 5.

the salary of the President, and insisted that he should be recognized and addressed as the President.⁹

Since the administration of Harrison and Tyler, six presidents have died in office, and six vice presidents have succeeded to the presidency. Upon the death of Zachary Taylor in 1850, Millard Fillmore became President. Johnson succeeded to the Presidency upon Lincoln's death in 1865. Chester A. Arthur succeeded Garfield in 1881. Theodore Roosevelt succeeded McKinley in 1901, Calvin Coolidge succeeded Harding in 1923, and Harry S. Truman succeeded Franklin D. Roosevelt in April, 1945. For more than seventy-five years there does not seem to have been any question or doubt about the Vice President succeeding to the Presidency upon the death or resignation of the President.

Upon the adoption of the Twentieth Amendment, this convention was recognized by Congress and by the people as a part of the Constitution. Section 3 of this Amendment is as follows:

"If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."

The amendment provides that, if the President-elect shall have died before the beginning of his term as President, the Vice President-elect shall become President, but it does not change in any way the existing convention that, upon the death of the President after he has qualified, the Vice President becomes President. In fact, the provision for the elevation of the Vice President-elect to the Presidency, without referring to death after qualification or making any provision for it, stamps this convention as a part of our Constitution, even though it has not been expressly adopted by amendment, statute or decision.¹⁰ Although the Vice

⁹ 2 Lyon G. Tyler, Letters and Times of Tylers, 13.

¹⁰ Amendment XX.

President has become President, it seems to be the law that he continues to hold the office of Vice President also.¹¹

§ 70. **Limitation of Duties of Vice President.** The succession of the Vice President to the Presidency upon the death or resignation of the President has given rise to another convention. The Vice President shall not discharge the powers and duties of the President and the same shall not devolve upon him in the case of the inability of the President to discharge such duties, except with the consent of the President.

This limitation is more serious than is at once apparent. Never in the more than 150 years that the Constitution has been in force has a President consented to the Vice President discharging the duties of the President, and there is no tribunal vested with authority to adjudge when an inability exists. The question has never been presented to the Supreme Court, but undoubtedly if presented the Court would declare that it was a political question and refuse to make any decision upon it.

The prominence of the President and the arduous responsibilities resting upon him make him subject to accident or disability in an extraordinary way. In 1881 President Garfield was shot by Gateau on July 2 and lingered through the resulting illness until September 19. Upon the meeting of Congress, President Arthur on December 6 recommended that Congress take some action to remedy the defect but nothing was done.

A more serious situation arose during the administration of President Wilson. Although the World War had given rise to critical national problems, President Wilson was continuously absent from the United States from December 4, 1918 to July 8, 1919, except for nine or ten days from February 24 to March 5, endeavoring to settle European problems and to assist in establishing a League of Nations. During this extended period, the President was more than 3000 miles from the scene of his active governmental duties in Washington, and no person was present in the nation who was permitted to perform such duties.

Another crisis occurred during the administration of Woodrow Wilson. President Wilson became seriously ill during the fall of 1919. For eight months or more he was incapacitated, and the

¹¹ Merriam v. Clinch, 6 Blatchford 9. See also Murphy v. McBride, 29 Wash. 335, 70 Pac. 25; Chadwick v. Earhart, 11 Ore. 389, 4 Pac. 1180.

duties of the Presidency were either not performed or were performed by persons not authorized by the Constitution to exercise such powers. This was the period during which the momentous questions presented by the Versailles Treaty were before Congress and the people, and the nation needed the counsel and advice of the President and his active co-operation in the settling of our foreign policy and in the administration of the affairs of the nation.

Other crises or near crises have occurred during our history. Jackson was ill during the latter part of his second term of office. In 1814 during our second war with England, the British forces occupied Washington, burned the capital, and President Madison was compelled to flee to safety. During the Civil War, President Lincoln once narrowly escaped capture, and several times was in grave danger of serious injury.

§ 71. President's Cabinet. The cabinet is an extra-constitutional development. President Taft, writing of this body, remarked: "The cabinet is a mere creation of the President's will. It is an extra-statutory, extra-constitutional body. It exists only by custom."¹²

The Constitution of 1787 did not provide for a cabinet or any advisory council. The only reference it made to such a council was an indirect one. It provided: "He (President) may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."¹⁴ Washington used this provision extensively, obtaining from Jefferson and Hamilton written opinions, which today constitute most valuable state papers. Since Washington's administration the requiring of written opinions, except from the Attorney General, has been rather infrequently followed, the President preferring to consult his secretaries orally or to meet them personally during sessions of the cabinet.

The first record of the secretaries' meeting as a cabinet was in 1791. The meeting was suggested by President Washington to look after administrative business during his absence. Several meetings were held during 1792 and 1793. From this time it appears to have been recognized as an institution. In 1829 President Monroe mentioned it in a message to Congress. In 1879 the Supreme Court recognized it and distinguished its members from

¹² Taft, *Our Chief Magistrate and His Powers*, 30.

¹⁴ Constitution of the United States, Art. II, § 2, cl. 1.

the inferior officers of the departments, Justice Miller saying: "While it has been the custom of the President to require these opinions from the Secretary of State, the Treasury, of War, Navy, etc., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or any commissioner or auditor in these departments." ¹⁵

The cabinet today consists of the secretaries of the ten government departments. Several presidents in recent years have invited the Vice President to attend the meetings, which are held at the call of the President.

The cabinet is now a recognized institution of our constitutional government. While the President has the power to dispense with it, he could not do so without suffering the force of an unfavorable popular opinion. The tendency is not to abolish it, but to use it to inspire support and confidence. This was especially true during President Wilson's illness. Although the President was unable to attend meetings for more than eight months, the cabinet met no less than 25 times in order to instill confidence in the people.¹⁶

§ 72. Popular Election of President. The popular election of the President and Vice President by states is another convention of the Constitution.

Section 1 of Article II. of the Constitution and the Twelfth Amendment set up the machinery of the electoral college. This machinery provided that each state, in such manner as the legislature thereof should direct, should appoint a number of electors equal to the whole number of senators and representatives to which the state should be entitled in Congress; that these electors should meet in their respective states and vote by ballot for President and Vice President; that they should name in their ballots the persons voted for as President, and in distinct ballots the persons voted for as Vice President, and of the numbers of votes for each; that they should sign and certify to lists containing the results, and transmit them sealed to the seat of government of the United States, directed to the President of the Senate; that the President of the Senate, in the presence of the Senate and House of Representatives, should open all the certificates and they should then be counted; that the person having the greatest number of votes should be de-

¹⁵ United States v. Germaine, 99 U. S. 508, 25 L. ed. 482.

¹⁶ Lawrence, The True Story of Woodrow Wilson, 285.

clared elected President, if such number should be a majority of the whole number of electors appointed. If no person should have such majority, then the House of Representatives was empowered to choose the President from the highest three candidates on the list.

The purpose of these provisions was early set forth by Alexander Hamilton. "It was equally desirable," he wrote, "that the immediate election should be by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. . . . The choice of several to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of one who was himself to be the final object of the public wishes. And as the electors chosen in each state are to assemble and vote in the state in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time in one place."¹⁷ It is obvious, therefore, that the Constitution contemplated that the electoral college should be a deliberative body of men. The electors were not expected to vote as a unit, and they were not expected to merely record a result reached by a majority of the voters at a general election.

While the machinery set up by the Constitution was rigid and inflexible, it contained a provision that was subject to growth and development to meet the rapidly changing conditions of the last century. It empowered the state to appoint electors in such manner as the legislature should direct. For a number of years the legislatures made the appointments. Early in 1800, however, the states gave the people the right of election, except in the case of South Carolina which retained the old method until 1860. In 1828 the electors were selected largely by districts, the districts choosing the electors at large. Later the names of the President and Vice President were printed at the head of the party ticket, and the names of the electors followed in alphabetical order. More recently, the names of the President and Vice President only appear, a vote for these officers being considered a vote for each of the electors.¹⁸

¹⁷ The Federalist No. LXIX.

Cohen, 146 Misc. 836, 262 N. Y. S.

¹⁸ McPherson v. Blacker, 146 U. 320.

S. 1, 36 L. ed. 869; Thomas v.

The theory that the Electoral College should be a deliberative body was also changed during the early part of the last century. For much more than a generation the people of this country have understood that the presidential candidate who received the plurality in a state was entitled to the electoral vote of that state. That understanding came about through the almost unfailing performance of presidential electors. Starting in 1789 with a system by which uninstructed electors chose the chief executive officers, we have today a system of popular balloting for the candidates nominated by the national conventions of their parties, which conventions are held months before the election in November.

This change has been an evolution in our government. Let us see how it came about. In the first two elections (1789 and 1792) everybody favored George Washington, so the independence of the electors appointed by the legislatures, was not a factor. In 1796 party lines, consisting of Federalists and Republicans, appeared. Adams and Jefferson were the candidates, and practically all the electoral votes were cast for them. The fourth election was a party struggle but, when the popular votes were cast, the battle ended. The result was accepted without comment or contest. Subsequently, the electors met and recorded their choice exactly as the popular vote directed. Thereafter, in order to center on one man, the members of Congress acting as a caucus agreed upon the candidate the electors should vote for, if successful. For many years the electors thus followed the will of the voters. Less than 100 years ago the idea of a national convention was born, and since then the aspirants have been named by the political parties.¹⁹

The requirement that each elector must vote for the candidate of his party is now so thoroughly established that an elector seldom dares to violate it.²⁰ The state of Oregon has enacted a statute re-

¹⁹ *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869.

²⁰ *State ex rel. Hawke v. Myers*, 132 Ohio 18, 4 N. E. (2d) 397. In 1820 William Plumer, a former governor of New Hampshire voted against the re-election of James Monroe. In 1892, one Kentucky elector and five Michigan electors voted for Grover Cleveland, although Benjamin Harrison had received a majority of the popular

vote. In 1896, one California elector voted for Bryan, although McKinley had carried the state. In 1904 Maryland cast seven electoral votes for Parker for Vice President, and only one for Roosevelt although Roosevelt had received the majority of the popular vote. In 1908 Maryland, in the Taft-Bryan fight, voted six for Taft and two for Bryan, although Taft had received the majority of

quiring that candidates for electors shall pledge themselves, if elected, to vote for the party nominees for President and Vice President in the electoral college.²¹ In Pennsylvania the national presidential nominee selects the candidates for electors to be voted for in the state at the general election.²² In Nebraska the Supreme Court held that, when a person accepted the nomination as elector, he in effect pledged himself to vote for the candidates of his party for President and Vice President who should be subsequently nominated by the national convention, and, when in 1912 electors nominated by the Republican party asserted that they intended to vote for the candidates of the Progressive party, the court forbade the printing of their names on the Republican ticket.²³ In the great majority of the states, however, the requirement of the electors to vote for the candidates of the party rests upon usage.

Concerning this usage Judge Cuff of the Supreme Court of King's County, New York, in holding that only the names of the President and Vice President need appear on cards of voting machines, remarked: "On election day people vote, not for electors (it is safe to say that no voter could name those he voted for), but for the nominees for President and Vice President The practice of electors voting for the presidential candidates of their party boasts of an unbroken record of fulfillment. The American people have grown to regard the electoral college as a matter of minor importance. Very few know exactly when and where the meeting takes place, and a great many have no knowledge of the gathering at all. The electors are expected to choose the nominee of the party they represent, and no one else. So sacred and compelling is that obligation upon them, so long has its observance been recognized by faithful performance, so unexpected and destructive of order in our land would be its violation, that the trust that was originally conferred upon the electors by the people, to express their will by the selections they make, has, over these many years,

the popular vote. In 1912, California voted eleven for Roosevelt and two for Wilson, in spite of the fact that Roosevelt had received the majority of the popular vote.

²¹ 2 Oregon Laws, § 3939. ("Said candidates shall pledge themselves, if elected, to vote for their party's nominees for President and Vice

President of the United States in the electoral college.")

²² See Purdon's Pennsylvania Statutes Annotated, Title 25, §§ 2878, 3192-3194.

²³ Nebraska v. Wait, 92 Neb. 313, 138 N. W. 159, 43 L. R. A. (N. S.) 292.

ripened into a bounden duty—as *binding upon them as if it were written into the organic law*. The elector who attempted to disregard that duty could, in my opinion, be required by mandamus to carry out the mandate of the voters of his state.”²⁴

Thus, without changing a word of the fundamental law, convention in the form of the silent process of customary observance has modified the Constitution so that today the President and the Vice President are elected by the states by the people voting directly for the candidates for such offices.

§ 73. Residence of Representatives in Congress. The Constitution provides that members of the House of Representatives shall be inhabitants of the states from which they are chosen, and authorities hold that the states have no power to add additional qualifications.²⁵

Convention and usage, however, have decreed that a member of the House of Representatives must be an inhabitant of the district from which he is elected. This requirement is universal, except perhaps in such cities as New York where a representative living in an uptown district may represent a district located downtown. The rule was so well established that not even Champ Clark, later speaker of the House, could break it. In later years, he complained in his autobiography that his early entrance into the House was delayed because of his election being restricted to the district in which he lived. The convention is merely the extension of the requirement that the representative shall be the inhabitant of the state he represents, and the same reasons exist in favor of the districts as exist in favor of the states as geographical units. Districts, like states, have many diverse interests which are entitled to representation. English critics of our government have been unable to understand this convention, because their country is so small in area that such a requirement would be a detriment rather than an asset to their political system.²⁶

§ 74. Speaker, Definition of Powers. The Constitution did not define the powers of the Speaker of the House of Representatives. It provided merely that the House should choose a speaker, and left

²⁴ Thomas v. Cohen, 146 Misc. 836, 262 N. Y. S. 320.

²⁶ Horwill, Usages of the American Constitution, Chap. IX.

²⁵ 1 Story on the Constitution (4th Ed.) 447.

the definition of his powers to usage and to the rules of parliamentary law.²⁷

The office was designed after the speaker of the British House of Commons, who sits as an impartial officer and is required to administer exactly the same treatment to his political friends as to his political foes. The English prototype was so well established in America that clauses providing for a speaker of the lower House were found in Constitutions of ten of the eleven states adopting constitutions during the year 1776 and thereafter.²⁸ When Thomas Jefferson prepared the first manual of parliamentary law for the House, he obtained his information from the British House of Commons, which was then considered to be the greatest legislative assembly in Christendom.²⁹

The speakership, as developed by usage during the past 150 years, is distinctly an American institution, and the powers exercised by the speaker are greatly in excess of those planned by the framers of the Constitution. Instead of being a moderator of the British type, he is a powerful political officer. He is the leader of his party and is responsible for the enactment of its legislative program in the House, and during the latter part of the last century he became so powerful that he was popularly known as the "Czar" or as the "American Premier."

The importance of the speakership is second only to the Presidency in the enactment of legislation. The speaker practically decides what bills shall be considered, how long debates shall last and when votes shall be taken. Until the sixty-second Congress, he appointed all committees, and commonly dispensed the privileges of the floor of the House in the interest of his party. From 1933 to 1945, Congress acted largely under the leadership of the President, and the speaker during this period exercised less control over legislation than he did during the period from 1890 to 1910.

§ 75. Other Usages. Many other usages exist in the administration of the government. These understandings have developed and are necessary for the smooth working of the Constitution. Some of them are well established, while others are not subject of

²⁷ Constitution of the United States, Art. I, § 4, cl. 5.

²⁸ Thorpe, *American Charters, Constitutions and Organic Laws* (State Constitutions).

²⁹ *9 Great Debates in American History*, 355.

precise definition. We will enumerate several of the most important of these customs.

Senatorial courtesy, which means that the President will appoint the officers of the Federal government in a state only with the advice and consent of the Senators from that state. The President has refused to extend this courtesy to senators who are openly hostile to him or his policies.

Courtesy of approval of cabinet officers. The Senate will not use its unquestioned power to refuse to confirm the appointment of a cabinet officer, except in case of the abuse of the appointive power. In 1925 the Senate refused to approve an appointment for Attorney General made by President Coolidge on the ground that the appointee had been the attorney for the sugar trust, which had been under almost continuous investigation for nearly forty years.

Public sessions of Congress. The sessions of both the Senate and House shall be public. The sessions of the House have always been public except in rare instances of public danger. In early days the sessions of the Senate were private. Through usage all sessions, except executive sessions, are public. The usage has been carried so far that the great debates over the Versailles Treaty were public, although such debates would have ordinarily been carried on in executive session.

Committees of Congress. The House of Representatives and the Senate conduct their legislation through committees. This usage rests only upon custom and the standing orders of each House.

Party caucus. The system of party caucuses is a usage by which each party determines its course of legislative action. Each legislator attending the caucus is required to obey the decision of the meeting.

Exclusion of cabinet officers from floor of Congress. Exclusion of cabinet officers from the floor of Congress is also an established usage. The secretaries of the several departments may appear before congressional committees, and may be called upon for reports or information, but they are prohibited from being present or speaking before either House of Congress except by invitation upon a purely ceremonial occasion.

President leader of his party. The President is the leader of his party. Since the adoption of the party system, and since the practice of presenting party platforms at each presidential election became the rule, the President has become the paramount force for

his party's success. Through messages to Congress and through persuasion and pressure methods, he has the responsibility of seeing that its legislative program is adopted, and that its political dominance is maintained.

In World War II, President Roosevelt, relying upon his war powers, at times pressed this leadership upon the entire Congress to the point of compulsion. For example, in a nation-wide radio address concerning the over-all stabilization of prices, salaries, wages and profits, he asserted: "In my message today I have told Congress that this must be done quickly—I have asked Congress to take this action by the first of October—In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility and I will act."³⁰

§ 76. Inherent Powers. There are certain powers of the Federal government which the Supreme Court has held to be inherent. These powers should be distinguished from the powers granted by the Constitution of 1787, or implied or evolved from such powers. They constitute a segment of governmental authority existing wholly independent of the written Constitution.

These powers were defined by Justice Sutherland in 1936 in the case of the *United States v. Curtiss-Wright Export Corp.* and have been affirmed in later cases.³¹ Even before this date the Supreme Court had said that the power of the Federal government to forbid the entrance of foreigners within the dominion of the United States was "inherent in sovereignty,"³² and the court had committed itself to the doctrine of unlimited power in the Federal government in foreign affairs, as an attribute of national sovereignty. "As a government the United States is vested with all the attributes of sovereignty," declared Justice McKenna as early as 1915, "As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with

³⁰ Address delivered September 7, 1942.

³¹ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255; *United States v. Belmont*, 301 U. S. 324, 81 L. ed. 1134; *United States v. Pink*, 315 U. S. 203, 86 L. ed. 796; Ex

parte *Richard Quirin*, 317 U. S. 1, 87 L. ed. 3.

³² *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905; *Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146. See also *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228.

other countries. *We should hesitate long before limiting or embarrassing such powers.*"³³

The extent to which our external and foreign relations are now subject to these powers, and how the powers granted by the Constitution of 1787 have been adjudged to be confirmatory only of the inherent powers of our Federal government will be discussed in later chapters.³⁴

³³ MacKenzie v. Hare, 239 U. S. 299, 60 L. ed. 297, Ann. Cas. 1916 E 645. See also Hughes, The Supreme Court of the United States, 115-117.

³⁴ See Chap. 9, § 78; Chap. 13, § 132; Chap. 17, § 188.

PART III

OUR FEDERAL SYSTEM

CHAPTER 9

THE UNITED STATES

We derive much of our strength as a nation from our dual system of federal government. To promote the harmonious working of that system the general clauses of the Constitution which broadly delineate boundaries of state and national power should be construed by appraising the respective state and national interests involved and striking a balance which gives appropriate recognition to the legitimate concerns of each government.

—Justice Murphy

§ 77. **In General.** The term United States may be used in any one of several senses. (a) It may be the name of the sovereign nation occupying the position analogous to that of other sovereign nations. (b) It may designate the territory over which the sovereignty of the United States extends; or (c) it may be the collective name of the states which are united by and under the Constitution.¹

Under (a) it is concerned with nationality and with foreign and external affairs, and under (c) it consists of the union of the states, and embraces the framework of our government and the powers defined by the written Constitution. In speaking of foreign affairs, our government is strictly national; as to domestic affairs, it may properly be considered Federal, although these

¹ *Hooven & Allison Co. v. Evatt*,
324 U. S. 652, 89 L. ed. 1252.

terms are generally used interchangeably, meaning the government of the United States.

§ 78. International Relationship. The United States is a member of the family of nations, and as such enjoys rights and privileges equal to those of other members of the international family. In this field the powers of the government consist of those derived from treaties, international understandings, compacts, the principles of international law and the powers of sovereignty which are inherent. "As a nation with all the attributes of sovereignty," proclaimed Chief Justice Hughes, "the United States is vested with all the powers of government necessary to maintain an effective control of international affairs."²

The doctrine of inherent powers is a development of recent years, but in reality the government always had these powers. During colonial times they were possessed by and under the control of the British Crown. Then, during the long period of colonial history, the idea of union evolved resulting in a unity of action through a common agency, namely, the Continental Congress, composed of delegates from the several states. This agency exercised the powers of war and peace, raised an army, created a navy and acted generally as the representative body and the spokesman of a unitary nation in foreign affairs. As a nation, and not as several colonies, the "representatives of the United States of America" adopted the Declaration of Independence, declaring the united colonies to be free and independent states, and as such to have "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."³ When, therefore, the Declaration of Independence was formally recognized by Great Britain and the external sovereignty of the colonies theretofore held by her ceased, it passed directly to the colonies or the states acting as a unit, and not severally, in their collective and corporate capacity as the United States of America. This notable constitutional fact was evidenced by the treaty of peace signed in Paris on September 3, 1783, which was entered into between his Britan-

² United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Belmont, 301 U. S. 324, 81 L. ed. 1134; Bur-

net v. Brooks, 288 U. S. 378, 77 L. ed. 844, 86 A. L. R. 747.

³ Declaration of Independence. See also Burnette, The Continental Congress, Chap. 9. See also Chap. 2, §§ 15, 16, supra.

nic Majesty and the United States of America. Since 1783 these powers have existed in the Federal government independent of the Articles of Confederation and of the written Constitution.⁴

This doctrine was announced by the Supreme Court in 1936 in the *Curtiss-Wright Export Corp.* case when Justice Sutherland declared: "Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . . The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.'"

The powers of the national government in external and foreign affairs, therefore, do not depend upon the affirmative grants of the Constitution of 1787. The power to declare and wage war, to conclude peace, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the national government as necessary concomitants of nationality. In other words these powers are inherent, rather than granted.⁵

⁴ See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255. That the Federal government possessed inherent powers independent of the provisions of the Articles of Confederation was suggested in 1785 by James Wilson who later became a member of the Constitutional Convention and an associate Justice of the Supreme Court. He wrote: "Though the United States in Congress assembled derives from the particular states no power, jurisdiction, or right which is not expressly delegated by the Constitution, it does not then follow that the United States in Congress has no other powers, jurisdiction, or right, than those delegated by the particular states. The United States have general rights, general powers, and general obligations, not derived from any particular

states, nor from the particular states taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, powers, and properties by the law of nations incident to such." *Works of James Wilson (Andrews)* Vol. 1, page 557.

⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255; *Burnet v. Brooks*, 288 U. S. 378, 77 L. ed. 844, 86 A. L. R. 747. See also *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691; *Nishimura Ekin v. United States*, 142 U. S. 651, 35 L. ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905; *United States v. Belmont*, 301 U. S. 324, 81 L. ed. 1134; *United States v. Pink*, 315 U. S. 203, 86 L. ed. 796.

§ 79. **Domestic Affairs.** The powers of the Federal government in domestic affairs are derived from the Constitution. In these affairs it can exercise no powers, except those specifically enumerated in the Fundamental Law of 1787, or implied, or evolved from such powers through statutes, decisions, and the customs and usages which have become established.⁶

Theoretically the Federal government possesses no inherent powers in domestic and internal affairs. The powers of the Fundamental Law of 1787 were carved from the general mass of powers, *then possessed by the states*, and were such portion of the state powers as it was thought desirable to vest in this government, leaving those not included still in the states unimpaired. Although the Supreme Court on many occasions has said that these powers are rigidly limited, since the announcement of the decision of *McCulloch v. Maryland* in 1819, it has consistently held that the means which may be employed to carry them into effect are not restricted save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with the letter and spirit of the Constitution.

The national government has no inherent powers over the internal affairs of the states. "It is no longer open to question," to quote Justice Sutherland, "that the general government . . . possesses no inherent power in respect to the internal affairs of the states, and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary to discuss."⁷

§ 80. **Union of the States.** The United States is a union of the several states under a common constitution. This union forms a distinct and greater political unit, which the Constitution designates as the United States or the United States of America. Under the Constitution, these several states are composed into one people and one country.

⁶ For the constitutional theory advanced by the liberal school, see Chap. 3, §§ 25, 27, *supra*.

⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L.

ed. 255; *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918 E 724.

The term state, as used in the Constitution, expresses the combined idea of people, territory and government. In its generic sense it means a political community of free citizens occupying a territory of defined boundaries and organized under a government established by the consent of the governed. It is used in a territorial or geographic sense in such clauses as the representation clause requiring that a representative in Congress shall be an inhabitant of the state in which he shall be chosen and that the trial of crimes shall be held in the state where the crime was committed. It is used in the governmental sense in the clause guaranteeing each state a republican form of government and in protecting each state against invasion. The union, therefore, comprising people, territory and government, is complete and, as we shall see, is indestructible.⁸

§ 81. **Union Indestructible.** The union of the states in constitutional law theory is indestructible. This doctrine was announced by Chief Justice Chase in the leading case of *Texas v. White* in which he wrote the results of the Civil War juridically into our constitutional structure. "The Constitution in all its provisions looks to an indestructible union composed of indestructible states," he proclaimed in a sentence which has become classic in our constitutional law.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation," the Chief Justice declared, "All the obligations of perpetual union, and all the guarantees of **republican government** in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. There was no place for reconsideration or revocation, except through revolution or through consent of the states."

For the union to be indissoluble does not mean that the states shall be deprived of their individual existence, or the right of self government. Each state had its own government, and was endowed with all the functions of an essential separate and independent

⁸ *Texas v. White*, 7 Wall. 700, 19 L. ed. 227.

existence. These governments were continued and there can be no loss of separate and individual autonomy to the states through their union under the Constitution. In fact, the preservation of the states and the maintenance of their governments is as much within the care of the Constitution as the preservation of the union and the maintenance of the national government. This doctrine is limited to the right of secession. It means that the union cannot be dissolved or broken up by states withdrawing or seceding as was attempted by southern states in 1860-1865.⁹

§ 82. Character of Constitution. The Constitution is not a league or compact between the states. It was not established by the states, and does not depend for its existence or continuance upon them. Although it was framed in a convention composed of delegates representing the several states, it was ratified by the people acting through their representatives in conventions. It was, therefore, an organic law ordained and established by the people of the United States. That this was the intention of the framers is revealed by the preamble which begins: "We the people of the United States," and such is the fact.¹⁰ This organic law created a permanent and indissoluble union.¹¹ Under it our present form of government became finally established.¹²

§ 83. Constitution—A Grant of Powers. The Constitution of 1787 is a grant of powers to the government that it created. Under it the Federal government can exercise only those powers which are specifically enumerated and such implied powers as are necessary and proper to carry into effect the enumerated powers.¹³

"While under the dual system which prevails with us the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers," spoke Justice Brewer, "yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state."¹⁴

⁹ *Texas v. White*, 7 Wall. 700, 19 L. ed. 227.

¹⁰ *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *Re Opinion of Justices*, 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412.

¹¹ *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

¹² *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956.

¹³ *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

¹⁴ *Re Debs*, 158 U. S. 564, 39 L. ed. 1092.

This limitation of course does not extend to foreign and external affairs, in which field the powers exercised by the government are inherent rather than granted in the strict sense of the Constitution being written.¹⁵

Theoretically new powers cannot be created except by amendment. Those who act under the grants of the Constitution cannot transcend the limits defined because they believe that more or different power is necessary. The exercise of extra authority in the field of constitutional activity was anticipated and precluded by the terms of the Tenth Amendment, which provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."¹⁶

The manner in which these powers have grown through the practical administration of the government has already been discussed in Chapters four, five, six, seven, and eight. As early as 1816 Justice Story laid the foundation for this growth when he announced "This instrument like every other grant is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication."¹⁷

§ 84. Constitution—Supreme Law. The Constitution provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."¹⁸

This provision was designed to carry out the expressed purpose of the Constitution, which was intended not merely to guard the

¹⁵ See annotation *supra*, note 5.

¹⁶ *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Kansas*

v. Colorado, 206 U. S. 46, 51 L. ed. 956, 971.

¹⁷ *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97. Also see annotation *supra*, note 4.

¹⁸ Constitution of United States, Art. VI, cl. 2.

states against foreign nations, but mainly to secure union and harmony at home.¹⁹ To accomplish this purpose it was necessary to establish a government supreme within its sphere and capable of self-preservation, thereby forming a union more perfect than existed under the Articles of Confederation.²⁰

The Constitution cannot be nullified as a whole or in part by an ordinary Act of Congress, and any act repugnant to the Constitution is void. "It is a proposition too plain to be contested," asserted Chief Justice Marshall, "that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by any ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall be pleased to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

The Constitution, laws and treaties of the United States are superior to the Constitutions and laws of the various states. In fact they are as much a part of the law of every state as its own local laws and constitution.²¹ The limitations and implied prohibitions upon the states, however, cannot be extended to the point of destroying the powers of the states or preventing their efficient exercise. "The states are, and they must ever be, coexistent with the national government," remarked Justice Strong. "Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."²²

All constitutional laws are binding upon all the people of all the states, including new states admitted to the union, whether they consent to be bound by them or not. Every constitutional Act of Congress is passed by the will of the people of the United States, expressed through their representatives, and when so passed be-

¹⁹ *Ableman v. Booth*, 25 How. 506, 16 L. ed. 169.

²⁰ *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287.

²¹ *Hanenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628.

²² *Union Pac. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

comes the supreme law of the land and operates by its own force in every state and territory.²³

The supremacy of the laws of the United States extends to the activities of the Federal government. This rule has been established as a corollary to Article VI.²⁴ The supremacy clause also extends to the instrumentalities of the Federal government created for a public purpose such as national banks. Any attempt by the states to define the duties of these activities or instrumentalities or control their conduct is absolutely void, wherever such attempted exercise of authority expressly conflicts with the Constitution or the laws of the United States, and either frustrates the purpose of national legislation or impairs the efficiency of the Federal government to discharge the duties for the performance of which they were created.²⁵ Although a state may not interfere with legitimate Federal activities, it is not prohibited from governing instrumentalities of the Federal government in their daily course of business in such transactions as the acquisition and transfer of property, the right to collect debts or the liability to be sued for debts, when such government does not incapacitate the instrumentality or impair its utility as an instrumentality of the Federal government.²⁶

§ 85. Respective Powers of Federal and State Governments. During the first one hundred and fifty years of the history of the Constitution, authorities considered the respective powers of the Federal and state governments well settled. There was no doubt about the principle that the Federal government could exercise only those powers delegated to it by the Constitution, and the correlative doctrine that the powers not granted are reserved exclusively to the states or to the people. This principle was considered established by the Tenth Amendment.²⁷

In 1935 Justice Roberts, concerned with the domestic issue of the constitutionality of the Agriculture Adjustment Act of 1933, affirmed this doctrine. "The question is not what power the Federal

²³ Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

²⁴ Mayo v. United States, 319 U. S. 441, 87 L. ed. 1504, 147 A. L. R. 761.

²⁵ Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700.

²⁶ McClellan v. Chipman, 164 U. S. 347, 41 L. ed. 461; Farmers & Mechanics Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701.

²⁷ Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

government ought to have," he said, "but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments—the state and the United States. Each state has all governmental powers save such as the people, by their constitution, have conferred upon the United States, denied to the states or reserved to themselves. The Federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members."²⁸

In spite of these positive views of Justice Roberts, there has been a gradual expansion of the functions of the Federal government. Congress enacted a second Agricultural Adjustment Act and the Supreme Court declared it constitutional.²⁹ In 1937 it enacted the Bituminous Coal Act, and this act too has been declared constitutional, the court holding that the Federal government has power to undertake the stabilization of an interstate industry through a process of price fixing.³⁰ In addition, the executive department has expanded its power through grants-in-aid projects and matched doles, and there has been generally a marked growth of federalism, and a revision in the conception of the functions of the Federal government.³¹

This expansion has resulted in an encroachment upon the powers of the state governments. Although the Federal government possesses no inherent powers in respect to the internal affairs of the states, yet every addition to the national legislative, executive or judicial powers invades the powers of the states.³² As a result, if the balance fixed by the Constitution is to be preserved, the powers of the general government cannot be so extended as to embrace

²⁸ *United States v. Butler*, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914.

²⁹ *Mulford v. Smith*, 307 U. S. 38, 83 L. ed. 1092.

³⁰ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263.

³¹ See Chap. 6, *supra*. See also *Carmichael v. Southern Coal &*

Coke Co., 301 U. S. 495, 81 L. ed. 1245, 109 A. L. R. 1327; *Charles C. Stewart Machine Co. v. Davis*, 301 U. S. 548, 81 L. ed. 1279, 109 A. L. R. 1293.

³² *Hammer v. Dagenhart*, 274 U. S. 251, 62 L. ed. 1101, 1107, 3 A. L. R. 649, Ann. Cas. 1918 E 724; *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160.

any not within the express terms of the several grants or the implications necessary to be drawn therefrom. The adherence to the relationship established by the Constitution is incumbent equally upon the Federal government and the states.³³ Speaking of the striking of a balance between Federal and States authorities, Justice Frankfurter observed: "Our federalism involves striking a balance between national and state authority—such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control, and the lively maintenance of local institutions. Therefore, in construing legislation, this court has disfavored inroads by implication on state authority."³⁴

The danger of this policy of encroachment is that in the end the states will become little more than geographical subdivisions. "Every journey to a forbidden end begins with the first step," warned Justice Sutherland, "and the danger of such a step by the Federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it never would have been ratified."³⁵

§ 86. Admission of New States. Section 3 of Article IV. of the Constitution provides for the admission of new states in the following language:

"New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, without the consent of the legislatures of the states concerned as well as of the Congress."

The following steps must be taken in order for a new state to secure admission to the union:

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| ³³ Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160. | also United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914; Baldwin v. Missouri, 281 U. S. 586, 71 L. ed. 1056, 1061 |
| ³⁴ Palmer v. Massachusetts, 308 U. S. 79, 84 L. ed. 93. | (dissenting opinion Justice Holmes). |
| ³⁵ Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160. See | |

- (a) Congress, in its political capacity, decides whether it is expedient that the territory be admitted as a state.
- (b) A statute is passed by Congress authorizing the admission of the state. This is called the "enabling act."
- (c) The state frames a constitution and this constitution is laid before Congress. Congress then decides whether this constitution is in conformity with the Federal Constitution and contains the guaranties that are required by the Federal Constitution.
- (d) If these facts are found in its favor, the Constitution is approved and the new state is admitted.³⁶

Upon admission the new state enters into the union upon an equal footing with the then existing states, and enjoys all the powers of sovereignty and jurisdiction which were possessed by the original thirteen states.³⁷ "The union was and is a union of the states," spoke Justice Lurton, "equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. . . . To maintain otherwise would be to say that the union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged and restricted by the conditions imposed upon new states by its own legislation admitting them into the union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution but only such as had not been further bargained away as conditions of admission." ³⁸

But there may be an agreement or a compact in reference to property, such as a provision restricting the legislative power of the state over federal public lands. Such a provision was in the act

³⁶ 1 Rem. Rev. Stat. of Washington 311-529. See codes and statutes of various states.

³⁷ Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Van Brocklin v. United States, 117 U. S. 151, 29 L. ed. 845.

³⁸ Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853. See also United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107.

admitting Minnesota to the Union. Speaking of this provision, Justice Brewer observed: "A mere agreement in reference to property involves no question of equality of states, but only of the power of a state to deal with the nation or with any other state in reference to such property."³⁹

When duly admitted there is a general transfer to the new state of the rights of citizens, of the jurisdiction of courts, and of the title to property. All members of the political community recognized by Congress become citizens of the new state and of the United States.⁴⁰ All cases pending in the territorial courts of a Federal character or jurisdiction are transferred to the proper Federal Court, and all cases not cognizable by the Federal courts are transferred to the courts or tribunals of the new state.⁴¹ Upon the concurrence of the Federal and state governments, records are transferred to the new state.⁴² Title and control of property owned by the territory passes to the new state.⁴³ Title to beds of non-navigable rivers passes to the new state, but title to beds of navigable rivers remains in the United States.⁴⁴

§ 87. Citizenship. The Constitution did not define citizenship,⁴⁵ and, until the adoption of the Fourteenth Amendment, it was said by many eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the union.⁴⁶ Then the Fourteenth Amendment was ratified in 1868. It contained the following provision:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make any law which shall abridge the privileges and immunities of the citizens of the United States."

This amendment created a dual citizenship. It established a citizenship of the United States and a citizenship of a state, which are dis-

³⁹ *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162.

⁴⁰ *Pollard v. Hagan*, 3 How. 223, 11 L. ed. 565; *Brown v. Grant*, 116 U. S. 212, 29 L. ed. 598.

⁴¹ *Baker v. Morton*, 12 Wall. 150, 20 L. ed. 262.

⁴² *Benner v. Porter*, 9 How. 235, 11 L. ed. 119.

⁴³ *Brown v. Grant*, 116 U. S. 207, 29 L. ed. 598.

⁴⁴ *United States v. Utah*, 283 U. S. 64, 75 L. ed. 844.

⁴⁵ Const. Art. 4, § 2, cl. 1.

⁴⁶ *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394.

inct from each other and which provided different privileges and immunities to be enjoyed by the individual.⁴⁷

The characteristics of citizenship in the states are the enjoyment of such rights and privileges as the right of marriage and divorce; the right to acquire, enjoy, sell or transfer one's property; the right to control one's children; the right of descent of one's property; the right to enjoy one's liberty and the pursuit of happiness; the right to enjoy the privileges of trade and commerce; the right to vote for the election of state officers and to decide state issues; and the right to become a candidate for a state office. They are "those privileges and immunities which are fundamental," remarked Justice Miller, "which belong to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this union."⁴⁸

The characteristics of citizenship of the United States are such privileges and immunities as the following: To come to the seat of government and to assert any claim upon the government; to transact business with the government; to have free access to seaports and foreign commerce; to be protected and to have one's property protected upon the high seas; to enjoy the right to peaceably assemble and to petition for redress of one's grievances; to be protected by the writ of habeas corpus; to use the postal system; to have access to the courts of the United States and their records; and to have the protection of the patent laws, copyright laws and bankruptcy laws.⁴⁹

A person may be a citizen of the United States without being a citizen of a state. For example, a citizen of the District of Columbia or the Territory of Alaska is a citizen of the United States, but not of any state. A person must reside within a state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the union.⁵⁰

⁴⁷ United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Snowden v. Hughes, 321 U. S. 1, 88 L. ed. 497.

⁴⁸ Ward v. Maryland, 12 Wall. 430, 20 L. ed. 452; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Snowden v. Hughes, 321 U. S. 1, 88 L. ed. 497.

⁴⁹ Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Twining v. New Jersey, 211 U. S. 78, 55 L. ed. 97.

⁵⁰ Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394.

There are two limitations upon the power of the states. (a) Each state is prohibited from discriminating in favor of its own citizens and against citizens of other states. (b) No state shall make any law which shall abridge the privileges and immunities of the citizens of the United States.⁵¹

Who are citizens? The Nationality Act of 1940, in addition to certain special provisions relating to Puerto Rico, the Canal Zone and the Republic of Panama, provided that the following persons shall be citizens of the United States at birth: (a) A person born in the United States and subject to the jurisdiction thereof; (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe; (c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens and one of whom resided in the United States or one of its outlying possessions prior to the birth of such person; (d) a person born outside of the United States and its outlying possessions of parents, one of whom is a citizen residing in the United States or its possessions prior to the birth of such person, and the other is a national but not a citizen; (e) a person born in an outlying possession of the United States of parents, one of whom is a citizen and resided in the United States or one of the possessions prior to the birth of such person; (f) a child of unknown parentage found in the United States; (g) a person born outside of the United States or its possessions of parents, one of whom is a citizen, who prior to the birth of such person had ten years of residence in the United States or its possessions, at least five of which were after attaining the age of fifteen years. In order to retain this citizenship, the child must reside in the United States for a period or periods totalling five years between the ages of thirteen and twenty-one years. This provision does not apply to a child born of American parents temporarily abroad in government or other employment or mission.⁵²

Children of aliens living permanently within the United States also are citizens.⁵³ Upon naturalization of foreign subjects, an infant child of such subjects, though born in a foreign country, be-

⁵¹ *Colgate v. Harvey*, 296 U. S. 404, 80 L. ed. 299, 102 A. L. R. 54.

⁵² Nationality Act of 1940, § 203, 8 USC 601-603.

⁵³ *United States v. Siebray*, 178 Fed. 152. See Nationality Act of 1940, §§ 313-316, 8 USC 601.

comes a citizen if dwelling in the United States.⁵⁴ Since 1922, a wife does not lose her citizenship by marrying an alien qualified to become a citizen, unless she formally renounces it in a court having jurisdiction over the naturalization of aliens. A woman who marries an alien ineligible to citizenship ceases to be a citizen.⁵⁵ A woman who has thus lost her citizenship can regain it only by naturalization, the same as any other alien.⁵⁶

Who are nationals but not citizens of the United States at birth? This class includes: (a) A person born in an outlying possession of the United States; one of whom is a national, but not a citizen of the United States; (b) a person born outside of the United States and its outlying possessions of parents both of whom are nationals, but not citizens, and have resided in the United States or one of its outlying possessions prior to the birth of such person; (c) a child of unknown parentage found in an outlying possession of the United States.⁵⁷⁻⁵⁸

§ 88. **Immigration.** The authority of Congress to control, restrict or prohibit immigration rests upon two powers. The one is the power to regulate foreign commerce. The other is the inherent power of every sovereign nation to exclude foreigners, or to admit them on such conditions as it may prescribe. "It is an accepted maxim of international law," wrote Justice Gray, "that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations in peace as well as in war."⁵⁹

The power belongs to the political department of the government, and may be exercised either through statutes enacted by Congress or through treaties made by the President and the Senate. In the exercise of its power, Congress has passed fifteen or more immigration acts and amendments. These acts have provided for a Bureau of Immigration, and immigration officers and stations. They have defined regulations and restrictions, established quotas, and defined quota and nonquota immigrants.

⁵⁴ Nationality Act of 1940, 8 USC 713-716.

⁵⁵ 8 USC Chap. 1, § 9.

⁵⁶ *In re Chamorra*, 298 Fed. 699.

⁵⁷⁻⁵⁸ Nationality Act of 1940, § 204, 8 USC 604.

⁵⁹ *Fong Yue Ting v. United States*,

149 U. S. 698, 37 L. ed. 905.

The chief administrative officer is the Commissioner General of Immigration, who is appointed by the President with the advice and consent of the Senate. He is an officer of the Department of Justice and performs all his duties under the direction of the Attorney General.⁶⁰ Immigration officials, subject to appeal to the Attorney General, have authority to hold summary hearings, receive evidence and enter orders of admission or exclusion and, unless expressly authorized by law, no other tribunal is at liberty to examine the sufficiency of the evidence taken.⁶¹

§ 89. Aliens. The authority of Congress over aliens is plenary. It may exclude them altogether, or it may prescribe the terms and conditions upon which they may come into or remain in the country.⁶² Aliens unlawfully in the United States are entitled to certain constitutional protections, such as the right of a judicial trial. An alien legally in the country is protected by the due process clause and the equal protection clause of the Constitution.⁶³ Speaking of the Federal Alien Registration Act of 1940 Justice Black remarked: "When it (Congress) made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law had intended guarding against."⁶⁴

Congress may at any time, in appropriate proceedings, order the deportment of aliens whose presence in the country it deems hurtful. This power is exercised by the Board of Immigration Appeals, from which an appeal may be taken to the Attorney General. Findings of fact reached after a fair hearing are conclusive, but the

⁶⁰ 8 USC 101. See Reorganization Plan Number V, approved June 4, 1940, U. S. C. Congressional Service 1940, page 249, 5 USCA 133t (note).

⁶¹ *Quon Quon Poy v. Johnson*, 273 U. S. 352, 71 L. ed. 680; *Skeffington v. Katzeff* (C. C. A. 1912), 277 Fed. 129; *In re Bucciarello*, 45 Fed. 463; *Oteiza y Cortes v. Jacobus*, 136 U. S. 330, 34 L. ed. 464. See Reorganization Plan

Number V, approved June 4, 1940, 5 USCA 133t (note).

⁶² *Lapina v. Williams*, 232 U. S. 78, 58 L. ed. 515.

⁶³ *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916 D 545, Ann. Cas. 1917 B, 283.

⁶⁴ *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 581. See also 8 USC 451.

validity of an order of deportation may be examined by the courts in habeas corpus proceedings.⁶⁵

Certain classes of aliens are excluded from admission to the United States. These include idiots, imbeciles, etc.; paupers; tubercular and other diseased persons; mental and physical defectives; criminals; polygamists; prostitutes; contract laborers; public charges; persons previously deported; persons whose transportation is paid by others; stowaways; children under sixteen unaccompanied by parents; and Asiatics. Aliens, returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years, may be admitted at the discretion of the Attorney General.⁶⁶

§ 90. Indian Tribes. The relation of the Indian Tribes to the United States has always been an anomaly, and a considerable body of constitutional law has been developed in order to fix the status and define the rights of this race. The relationship covers two periods, namely, the period of noncitizenship and the period of citizenship.

(a) *Noncitizenship.* This period extends to February 8, 1887, when an act providing for citizenship under certain conditions was adopted by Congress. Prior to this time all Indians were in effect, wards of the government. The Constitution had made no reference to them, except to exclude them from enumeration for direct taxes and representation in Congress,⁶⁷ and in the Commerce Clause,⁶⁸ and the courts had held that they were not foreign nations, and neither were they states or territories. "Though the Indians have unquestionable right to the lands they occupy until that right shall be extinguished by a voluntary cession to the government," to quote Chief Justice Marshall, "yet it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Mean-

⁶⁵ *Kwock Jan Fat v. White*, 253 U. S. 454, 64 L. ed. 1010; *Bridges v. Wixon*, 326 U. S. 135, 89 L. ed. 2103.

⁶⁶ 8 USC 136.

⁶⁷ Constitution, Art. I, § 2, cl. 3.

⁶⁸ Constitution, Art. I, § 8, cl. 3.

while they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”⁶⁹

During colonial days, relations with the tribes were determined by treaties made with them by the British Crown. Under the Articles of Confederation their rights were settled by treaty, and under the Constitution in the early years of the republic they were settled by treaty and statute, although under neither the Articles of Confederation nor the Constitution did the United States consider the affairs of the Indians, in the regulation of our foreign affairs or concerns with foreign nations.⁷⁰ In 1802 Congress enacted a comprehensive statute defining the territory of the Indians, regulating trade, and providing for punishment of offenses against them, but this statute did not attempt to interfere with or to regulate their internal affairs.⁷¹ In 1871, Congress enacted another statute declaring that no tribe thereafter should be recognized as a power with which a treaty could be made, although existing treaties were still recognized.⁷² After this date the national government handled the affairs of the Indians exclusively through agreement and through statutory and administrative regulations.⁷³ The next important statute was in 1885, when members of tribes were made criminally liable for offenses committed in Indian territories, and for offenses against other members, as well as strangers to the tribe.⁷⁴

Jurisdiction over the Indians has been exclusively in the Federal government and its authority has been exercised and enforced wherever the Indians have been found, whether upon the reservations, in the states or in territories belonging to the states.⁷⁵ In the administration of this authority, Congress has established a Bureau of Indian affairs, and provided for officers to administer these affairs. It has enacted statutes covering such subjects as agreements with these people; performance by the United States of its obligation to them; government of Indian country and

⁶⁹ *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25.

⁷⁰ *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25.

⁷¹ Act of March 30, 1802, 2 Stat. 139.

⁷² Revised Statutes of United States, § 2079.

⁷³ *Creek County v. Seber*, 318 U. S. 705, 87 L. ed. 1094.

⁷⁴ Act of March 3, 1885, 23 Stat. 362.

⁷⁵ *United States v. Barnhart*, 22 Fed. 285.

reservations; descent and distribution; irrigation; lease, sale, and surrender of lands and ceded lands.⁷⁶

The courts have further fixed the status of the Indians during this period. They have held that, although born within the territorial limits of the United States, they were not citizens;⁷⁷ that the general statutes of naturalization did not apply to them; that they could be naturalized only under a special act of Congress or by treaty;⁷⁸ that they could not vote under the provisions of the Fifteenth Amendment;⁷⁹ and that the power to make treaties with them is co-extensive with the power to make treaties with foreign nations.⁸⁰

(b) *Citizenship.* This period began with an enactment of Congress of February 8, 1887. As amended in 1906 this act provided that every Indian born within the territorial limits of the United States who has voluntarily taken up within these limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens.⁸¹ His status is now defined by the Nationality Act of 1940, which provided:

"The following shall be nationals and citizens of the United States at birth: (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, provided, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property."⁸²

To the extent that this provision granted or confirmed citizenship to the Indians, they will hereafter be subject to all the privileges

⁷⁶ 25 USC 1-13; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228. See also *United States v. Shoshone Tribe*, 304 U. S. 111, 83 L. ed. 1213; *Seminole Nation v. United States*, 316 U. S. 286, 86 L. ed. 1480 (dealings with these dependent and sometimes exploited people a distinctive obligation of trust); *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206, 87 L. ed. 716; *Choctaw Nation of Indians v. United States*, 318 U. S. 423, 87 L. ed. 877. But see *Creek Nation v. United States*, 318 U. S. 629, 87 L. ed. 1046.

⁷⁷ *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890.

⁷⁸ *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643.

⁷⁹ *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643.

⁸⁰ *United States v. Lariviere*, 93 U. S. 188, 23 L. ed. 846.

⁸¹ 24 Stat. 390; 34 Stat. 182.

⁸² Nationality Act of 1940, § 201, 8 USC 601; *Totus v. United States* (D. C.), 139 F. Supp. 7; *Ex parte Green* (C. C. A.), 123 F. (2d) 862.

of citizens, including the right to vote,⁸³ to be taxed unless they are specially exempted,⁸⁴ and to the guarantees established by the Constitution.⁸⁵ The Supreme Court has held that the grant of citizenship to them is not inconsistent with their status as wards of the government.⁸⁶

⁸³ See the Fifteenth Amendment.

⁸⁴ Oklahoma Tax Commission v. United States, 319 U. S. 598, 87 L. ed. 1612.

⁸⁵ United States v. Fisher, 222

U. S. 204, 56 L. ed. 165 (due process of law clause).

⁸⁶ Creek County v. Seber, 318 U. S. 705, 87 L. ed. 1094.

CHAPTER 10

STATES, TERRITORIES AND POSSESSIONS

The Constitution presupposes the continued existence of the states functioning in co-ordination with the national government.

—Chief Justice Stone

§ 91. Geographical and Political Units. The United States consists of the following geographical and political units: (a) States; (b) territories, such as Alaska; (c) District of Columbia¹; (d) territorial and insular possessions under the dominion and sovereignty of the United States, but not incorporated as a party of the nation.¹

§ 92. States. The term states as used in the Constitution has been defined in a former chapter.²

Thirteen states existed prior to the Constitution, and although they were called sovereign and independent states in the Declaration of Independence, they were never entirely sovereign in their undivided capacity because they were always in respect to the highest powers of sovereignty, subject to the control of a common authority, first the Continental Congress, and later the Federal government under the Articles of Confederation and the Constitution. They were never separately recognized or known as members of the family of nations.³

As respects each other, each state is an independent sovereignty.⁴ "The states remain sovereign within their separate spheres as to all powers not delegated to the general government or prohibited

¹ *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088; *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. ed. 138; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128.

² See Chap. 9, §§ 80, 81, *supra*.

³ *State v. Dixon*, 66 Mont. 76, 213 Pac. 227.

⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

to the states," remarked Justice Taylor of the Supreme Court of Vermont. "Subject to these restrictions each state is supreme and possesses the exclusive right of regulating its own internal affairs, and in all matters is sovereign so long as it does not conflict with the Federal Constitution."⁵

The following will illustrate the attributes of sovereignty possessed by the states subject to constitutional limitations:⁶ (a) Exercise of power of eminent domain;⁷ (b) exercise of taxing power;⁸ (c) determination of domestic and social status of persons domiciled in the state;⁹ (d) establishment of state courts and definition of their jurisdiction;¹⁰ (e) protection of the sovereign power of the state and maintenance of the state government;¹¹ (f) regulation of intrastate commerce;¹² (g) regulation of the acquisition, tenure, transfer and succession of property within the state;¹³ and (h) the exercise of the military, proprietary, contract, fiscal and police powers of the state.¹⁴

The distribution of the powers of the state governments is similar to that of the Federal government. All state constitutions provide for a separation of powers; for legislative, executive and judicial departments; for the independence of these departments to the extent of the acts of each not being controlled by or subjected, directly or indirectly, to the coercive influence of either of the other departments; for a system of checks and balances; for a duality of citizenship; and there has been a blending of powers similar to that found in the Federal government.¹⁵

⁵ *In re Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560.

⁶ *Thurlow v. Massachusetts*, 5 How. 504, 12 L. ed. 256.

⁷ See Chap. 29, *infra*.

⁸ See Chap. 28, *infra*; see also *Texas v. White*, 7 Wallace 700, 19 L. ed. 227.

⁹ *Strader v. Graham*, 10 How. 82, 13 L. ed. 337.

¹⁰ *Hoxie v. New York*, N. H. & H. R. Co., 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

¹¹ *Luther v. Borden*, 7 How. 1, 12 L. ed. 581.

¹² *Thurlow v. Massachusetts*, 5 How. 504, 12 L. ed. 256.

¹³ *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820, 16 A. L. R. 685.

¹⁴ See Chap. 27, *infra*; Const. Art. I, § 8, clauses 15 and 16, § 10, clauses 1, 3; *State v. Superior Court*, 91 Wash. 454, 157 Pac. 1097; *New Jersey v. Wilson*, 7 Cr. 164, 3 L. ed. 303.

¹⁵ *Parker v. Riley*, 18 Cal. (2d) 83, 113 P. (2d) 873, 134 A. L. R. 1405; *People ex rel. Leaf v. Orvis*, 374 Ill. 536, 30 N. E. (2d) 28, 132 A. L. R. 1482. See also Chap. 11, *infra*.

§ 93. **Compacts and Agreements Between States.** The Constitution provides:

"No state shall without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power."¹⁶

The terms compacts and agreements are used to cover all stipulations affecting the conduct or claims of the states. There is no distinction in the meaning of the terms, except that the word compact is generally used with reference to more formal and serious engagements than is usually applied to the term agreement.¹⁷

Under construction by the courts this clause has been limited to those compacts and agreements tending to increase the political power of the states or which may encroach upon or interfere with the supremacy of the United States. It does not apply to matters which in no respect concern the United States. For example, an agreement to prevent disease and to promote the health of the state by draining swamps would not need the consent of the Federal government, while an agreement to reestablish boundaries would be prohibited without its consent.¹⁸

The mode of obtaining the consent of Congress was not fixed by the Constitution, but was left to the construction of Congress and the courts. Under this construction it has been decided that the consent may be oral or written or even implied, or inferred from the circumstances, and it may be obtained either before or after the compact is entered into. In most cases, the consent will precede the compact or agreement. If Congress refuses its permission, or the states cannot agree, a resort may be had to the Courts, but "resort to the judicial remedy is never essential to the adjustment of interstate controversies," observed Justice Brandeis, "unless the states are unable to agree upon terms of a compact, or Congress refuses its consent." At times the courts have suggested that the states endeavor with the approval of Congress to adjust their boundaries or controversies over other subjects.¹⁹

¹⁶ Const. Art. I, § 10, cl. 3.

¹⁷ *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537.

¹⁸ *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537; *Wilson v. Mason*, 1 Cr. 45, 9 L. ed. 233; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

¹⁹ *Virginia v. Tennessee*, 148 U.

S. 503, 37 L. ed. 537; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547; *Virginia v. West Virginia*, 11 Wall. 39, 51 L. ed. 1068; *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 669; *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 82 L. ed. 1202.

Congress may impose conditions to its consent. "Normally," to quote Chief Justice Hughes, "where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation."²⁰

Compacts and agreements between states should be distinguished from the treaty making power which is inherent in the Federal government. The states are expressly forbidden by the Constitution from entering into any treaty or alliance with a foreign power. They are forbidden to enter into any agreement or compact with a foreign power, except with the consent of Congress. Although this provision implies that a state may, with the consent of Congress, enter into a compact with a foreign nation, no state has ever entered into such a compact or sought the approval of Congress to do so.²¹

§ 94. Public Acts, Records and Judicial Proceedings. Constitutional and statutory provisions relating to public acts, records and judicial proceedings are as follows:

"Full faith and credit shall be given in each state to public acts, records and judicial proceedings of every state. And the Congress may by general laws prescribe the manner in which such acts, records, and judicial proceedings shall be proved and the effect thereof."²²

"The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the Clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."²³

The terms public acts and records include state statutes and by Act of Congress they have been extended to include the acts and records of territories, and countries subject to the jurisdiction of

²⁰ James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318; Arizona v. California, 292 U. S. 341, 78 L. ed. 1298.

²¹ Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; Florida v.

Georgia, 17 How. 478, 15 L. ed. 181; Const. Art. I, § 10, Clauses 1, 3; Sutherland, Constitutional Power and World Affairs, 122.

²² Const. Art. IV, § 1.

²³ 28 USC 687.

the United States. The Supreme Court has clarified the effect to be given these records and proceedings. "The Constitution did not mean to confer any new power upon the states," Chief Justice Fuller remarked, "but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other states, and they enjoy not the right of priority or privilege or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives them by its own laws in their character of foreign judgments."²⁴

To this statement may be added the comment of Justice Gray. "When duly pleaded and proved in a court of that state," he said, "they have the effect of being not merely *prima facie* evidence, but conclusive proof of the rights adjudicated; and a refusal to give them force and effect in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States." Recovery upon such a judgment can be resisted only on the grounds (a) that the court which rendered it was without jurisdiction; (b) that it has been discharged; or (c) because it was procured by fraud.²⁵

The clause, however, does not require one state to substitute for its own law the conflicting law of another state. It does not enable one state to legislate for another. Neither does it require the courts of a state to enforce a contract based upon a statute or rules of law of a sister state, when to do so would impair or destroy the rights of citizens of other states or be contrary to the public policy of the state in which the action is pending. Speaking of statutes, Justice Roberts asserted: "A state may limit or prohibit the mak-

²⁴ *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695; *Smithsonian Institution v. St. John*, 214 U. S. 19, 53 L. ed. 892; *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, 76 L. ed. 254; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Riley v. New York Trust Co.* 315 U. S. 343, 86 L. ed. 885.

²⁵ *Huntington v. Attrill*, 146 U.

S. 657, 36 L. ed. 1123; *Mills v. Dur- yee*, 7 Cr. 481, 3 L. ed. 411; *Ameri- can Exp. Co. v. Mullins*, 212 U. S. 311, 53 L. ed. 525; *Milwaukee County v. White Co.*, 296 U. S. 268, 80 L. ed. 220; *Milliken v. Myers*, 311 U. S. 457, 85 L. ed. 278, 132 A. L. R. 1357; *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 88 L. ed. 149, 150 A. L. R. 413.

ing of certain contracts within its borders—but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the rights of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made—nor may it, in an action based on such contract, enlarge the obligation of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.”²⁶

Discussing a contract contrary to the public policy of the forum, Justice Reed observed: “It is rudimentary that a state will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals and would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought.” The court, therefore, denied recovery on an insurance policy where the beneficiary had no insurable interest under the laws of the state of the forum, although no insurable interest was required in the state where the contract was made.²⁷

The clause requires the extra state recognition of the validity of a divorce decree secured in accordance with the requirements of procedural due process, even though the enforcement of the decree conflicts with the policy of the sister state, but the clause comes into operation only when the jurisdiction of the court rendering the judgment is not impeached. The Supreme Court is the final arbiter as to what limitation shall be placed upon the clause.²⁸

The courts of the United States are required to give full faith and credit to the judgments of the state courts,²⁹ provided the judgment has been rendered upon the personal service of process upon the defendant.³⁰ This means that they must give the same

²⁶ *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. ed. 1178, 92 A. L. R. 928; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U. S. 493, 83 L. ed. 940; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 82 L. ed. 1202.

²⁷ *Griffin v. McCoach*, 313 U. S. 498, 85 L. ed. 1481.

²⁸ *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 279, 143

A. L. R. 1273; *Williams v. North Carolina*, 325 U. S. 226, 89 L. ed. 1577, 157 A. L. R. 1377; *Esenwein v. Pennsylvania*, 325 U. S. 279, 89 L. ed. 1608.

²⁹ *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808; *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U. S. 154, 89 L. ed. 812.

³⁰ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

faith and credit to these judgments, as one state is required to give the judgments of the courts of sister states.³¹

§ 95. Privileges and Immunities of Citizens. The Constitution provides:

“The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.”³²

The privileges and immunities referred to in this provision are those which in their nature are fundamental and which belong of right to all citizens of the several states. They may be comprehended under the following heads: Protection by the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind; to pursue and possess happiness and safety subject only to such restraints as the government may justly prescribe for the good of the whole people; the right of a citizen to pass through or reside in any other state; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the states; but it is discretionary with a state court as to whether it will entertain an action brought by a resident of another state to recover damages by an accident in such other state under a statute applicable alike to nonresident citizens and nonresident noncitizens; to hold and dispose of real and personal property; to enjoy an exemption from higher taxes or impositions than are paid by the other citizens of the state; and to enjoy the elective franchise as regulated and established by the constitution of the state. But an act giving resident creditors priority over nonresident creditors as to the assets of a foreign corporation was held invalid by the Supreme Court.³³

The term citizens as used in this clause refers only to natural persons. It does not include corporations or other artificial persons created by the legislatures and having only the powers and attributes which the legislature has granted.³⁴ A state may grant or refuse a corporation the right of doing business within its territory, or it may impose conditions upon which this privilege shall be

³¹ *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808.

³² Const. Art. IV. § 2, cl. 1.

³³ *Douglas v. New York, N. H. & H. Ry. Co.*, 279 U. S. 377, 73 L. ed. 747; *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091; *Kane v. New Jersey*, 242 U. S. 160, 61

L. ed. 222; *Hendricks v. Maryland*, 235 U. S. 610, 59 L. ed. 385; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745.

³⁴ *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

granted.³⁵ As this protection is extended only to citizens of the states, it does not apply to aliens or unnaturalized persons.³⁶

This provision does not control the power of the state governments over the rights, privileges and immunities of their own citizens. It goes no further than prohibiting a state from imposing a burden upon citizens of other states not imposed upon its own citizens. This it cannot do.³⁷

The provision does not apply to those engaging in the professions or trades requiring special skill. Before engaging in their occupations, the state may require these people to take examinations and to prove that they are qualified to perform the duties required of them. To this class belong lawyers, physicians and surgeons, dentists, druggists, pharmacists, veterinary surgeons, barbers, insurance salesmen, stockbrokers, as well as other occupations requiring special training and skill.³⁸ Frequently a question arises over discriminating taxes. States and municipal corporations will enact statutes and ordinances imposing a license tax upon salesmen, peddlers or other traveling merchants. These taxes are within the provision, and are illegal if they place a heavier burden of taxation upon the noncitizen than is borne by the citizen of the state, or accord the citizen greater privileges than are enjoyed by the non-citizen.³⁹

§ 96. Extradition. Extradition is the process of securing the surrender of an alleged criminal by one state or sovereignty to another having the jurisdiction to try the fugitive upon the charge preferred. It may be (a) interstate or (b) international.

(a) *Interstate.* The Constitution provides:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."⁴⁰

³⁵ Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164.

³⁶ State v. Hirabayashi, 133 Wash. 462, 233 Pac. 948.

³⁷ In re Johnson's Estate, 139 Cal. 532, 73 Pac. 42, 96 Am. St. Rep. 161; Blake v. McClung, 8 Wall. 168, 43 L. ed. 432.

³⁸ State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306;

State v. Green, 112 Ind. 468, 15 N. E. 352; LaTourette v. McMaster, 248 U. S. 465, 63 L. ed. 362; Keeley v. Evans, 271 Fed. 520; King v. Kentucky Board of Pharmacy, 160 Ky. 74, 169 S. W. 600.

³⁹ Bacon v. Locke, 42 Wash. 215, 83 Pac. 721; Ward v. Maryland, 12 Wall. 418; 20 L. ed. 449.

⁴⁰ Const. Art. IV, § 2, cl. 2.

This provision of the Constitution is not self-executing, and Congress enacted a statute restating the constitutional provision; extending it to territories; and declaring that it shall be the duty of the executive authority of the state to cause the fugitive to be arrested and secured and delivered to the agent of the demanding state.⁴¹

The constitutional provision, however, and the statute are directory rather than mandatory. Although the duty of the chief executive is not discretionary, there is no authority to compel him to perform the duty, and the result is that the obligation on his part is largely moral. "But looking to the subject matter and the relations which the United States and the several states bear to each other," to quote Chief Justice Taney, "the court is of the opinion that the words 'it shall be the duty' were not used as mandatory and compulsory, but declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it."⁴²

The procedure required to secure the extradition of a fugitive under this provision is as follows:

- (a) The person claimed to be a fugitive must be charged with treason, felony or other crime in the state in which the offense was committed.
- (b) The person so charged must be a fugitive from justice from that state.
- (c) The indictment or information must be placed in the hands of the executive authority of the state from which the fugitive has fled.
- (d) The executive authority of this state must demand delivery of the fugitive.

⁴¹ 18 USC 662. See also Roberts ⁴² Kentucky v. Dennison, 24 v. Riley, 116 U. S. 80, 29 L. ed. How. 66, 16 L. ed. 717.
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- (e) The requisition should be accompanied by a copy of the indictment or information, or a copy of the affidavit charging the offense.
- (f) The chief executive of the asylum state, upon receiving the requisition, is required to cause the arrest and delivery of the fugitive.
- (g) The chief executive, at his discretion, may grant the fugitive a hearing; if a hearing is granted, he may honor the requisition or he may neglect or refuse to honor it.⁴³

Both the Federal and state courts may inquire into the lawfulness of the custody in which the accused is held, through habeas corpus proceedings. The courts, however, will not approve a discharge of the fugitive unless it appears from the record by clear and satisfactory evidence that he was outside of the demanding state when the crime was committed. It will not inquire into his guilt or innocence.⁴⁴ It is not proper for the courts to inquire into the motives controlling the actions of the chief executives of either the state demanding the fugitive or the one surrendering or refusing to surrender him.⁴⁵

The fugitive may be removed to the state in which the offense was committed through force so long as there is no unlawful violence, and even though there is an abuse of process. Even though this is done, he may still be brought before the courts for trial and punishment. Upon extradition, he may be tried not only for the offense charged in the requisition papers, but also for any and all other criminal charges that the state may have against him.⁴⁶

(b) *International*. This is an inherent power of the Federal government. It is founded upon existing treaties, and the authority of the United States to surrender or to demand the surrender of a fugitive is limited to the provisions of the treaty existing between this country and the foreign nation concerned. It is a na-

⁴³ 18 USC 662; *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717.

⁴⁴ *South Carolina v. Bailey*, 289 U. S. 412, 77 L. ed. 1292; *In re Harris*, 309 Mass. 180, 34 N. E. (2d) 504, 135 A. L. R. 969.

⁴⁵ *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148; *Drew v. Thaw*, 235 U. S. 432, 59 L. ed. 302; *Ex parte Reggel*, 114 U. S. 642, 29

L. ed. 250; *Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, 52 L. ed. 121.

⁴⁶ *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 7 Ann. Cas. 1047.

tional power, pertaining to the Federal government and not to the states. Proceedings against the fugitive must be authorized by the terms of a treaty or by an act of Congress, and the President has no discretion to surrender him to a foreign nation unless that discretion is granted by law. The Constitution creates no executive prerogative to thus dispose of the liberty of an individual.

Extradition treaties do not generally include in their provisions authority to secure the surrender of political offenders.^{46a}

§ 97. Republican Form of Government. The Constitution provides:

“The Constitution shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.”⁴⁷

Although this provision guarantees to every state a republican form of government, no particular form is defined or exactly designated, and one is required to look to the existing state governments to ascertain what the framers intended. All the states had governments when the Constitution was adopted. In all of them the people participated to some extent through their representatives elected in the manner provided in their constitutions. These governments the Constitution did not change. They were accepted precisely as they were, and it is to be presumed, therefore, that they were such as it was the duty of the state to provide. Thus we have unmistakable evidence of what the Framers considered was republican in form within the meaning of the term as employed in the Constitution.⁴⁸ The essential test of whether a government is republican is that the will of the people is expressed in majorities, and that the ultimate decision of political questions is left to their will, expressed through the exercise of the right of suffrage.⁴⁹

^{46a} *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255; *Valentine v. United States ex rel. Neidecker*, 299 U. S. 5, 81 L. ed. 5.

⁴⁷ Const. Art. IV, § 4.

⁴⁸ *Minor v. Happersett*, 21 Wall. 175, 22 L. ed. 627; *Appeal of Allyn*, 81 Conn. 534, 71 Atl. 794, 129 Am. St. Rep. 225, 23 L. R. A. (N. S.) 630. See also Chap. 1, § 10, *supra*.

⁴⁹ *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *Cochran v. Louisiana State Board of Education*, 281 U. S. 370, 74 L. ed. 913; *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U. S. 74, 74 L. ed. 710, 66 A. L. R. 1460; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, Ann. Cas. 1917 D 642.

The question of whether a state government is republican is a political one, and resides with Congress rather than in the courts.⁵⁰ For example, the question of whether the initiative and referendum preserves to the state a republican form of government is for Congress to decide.⁵¹ Likewise, it rests with Congress to decide what government is the established one in a state.⁵²

The purpose of the guaranty was to provide a form of government for the states as a united whole, and it does not, therefore, control systems of local government, such as municipalities provide for the regulation of their local affairs. A statute, therefore, committing the functions of a municipal government to a single board, and ignoring the legislative and judicial departments, does not violate the Constitution.⁵³

This provision enables the national government to protect the states against invasion and, on application of any state, to protect it against domestic violence. It probably has the same power under the war clauses, the commerce clause, the postal clause and other clauses of the Constitution.⁵⁴ The President may use the regular army or he may use the militia of the states whenever he may deem it necessary to repel invasion, suppress rebellion, or to execute the laws of the nation.⁵⁵

§ 98. Territories. A territory under the Constitution is an organized subdivision of the national domain. It is an inchoate state. It is a portion of the country not included within the limits of any state, and not yet admitted as a state into the union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President with the advice and consent of the Senate.⁵⁶

The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme,

⁵⁰ *Bryant v. Akron Metropolitan Park Dist.*, 281 U. S. 74, 74 L. ed. 710; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. ed. 835.

⁵¹ *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, L. R. A. 1917 D 10.

⁵² *Luther v. Borden*, 7 How. 42, 12 L. ed. 581.

⁵³ *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177; *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912 C 994.

⁵⁴ *In re Debs*, 158 U. S. 564, 39 L. ed. 1092.

⁵⁵ 32 USC 81 (a).

⁵⁶ *Ex parte Morgan* (D. C. Ark.), 20 Fed. 298.

and has all the powers of the people of the United States, except such as has been reserved in the prohibitions of the Constitution.⁵⁷ This organic act may be modified by Congress at any time.⁵⁸

The following propositions relating to territories, and their status and the rights of citizens under the Constitution, may be considered to be well established by the decisions of the Supreme Court of the United States.

- (a) That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;
- (b) That territories are not states, within the meaning of Revised Statutes, Sec. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;
- (c) That the District of Columbia and the territories are states; as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property;
- (d) That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;
- (e) That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.⁵⁹

Each territory has a complete territorial government, consisting of a governor, legislature and courts, and minor units such as counties, school districts, etc. The governor, judges, and other principal officers are appointed by the President. Territorial legislatures are forbidden by an Act of Congress to enact local laws on many different subjects such as divorce, changing the law of descent, granting any corporation, association or individual any special or exclusive privilege, immunity or franchise, and other laws of a general nature. All laws upon other subjects, enacted

⁵⁷ First Nat. Bank v. Yankton, v. United States, 136 U. S. 1, 34 101 U. S. 129, 25 L. ed. 1046; L. ed. 481.

American Ins. Co. v. Canter, 1 Pet. 511, 7 L. ed. 242; Rasmussen v. U. S. 201, 82 L. ed. 748.

United States, 197 U. S. 516, 49 L. ed. 862; Church of Jesus Christ ⁵⁸ Mookini v. United States, 303 U. S. 201, 82 L. ed. 748. ⁵⁹ Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088.

by their legislatures may be overruled by Congress. Territorial laws are not laws of the United States.⁶⁰

Alaska and Hawaii are our only territories. All others have been admitted to full statehood.⁶¹

§ 99. District of Columbia. The District of Columbia was organized under a special provision of the Constitution enabling the United States to acquire territory for a seat of government. It provides "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States."⁶²

The district is under the exclusive jurisdiction of Congress. It has courts, but no legislature, and its citizens have no right of suffrage.⁶³ It has no self-government, but is governed by a board consisting of two commissioners and an officer of the Corps of Engineers of the United States Army. The commissioners are appointed by the President with the approval of the Senate.⁶⁴

Congress exercises exclusive legislative power over the district, and has entire control of its affairs for every purpose, national and local. It may exercise within the district all the powers which the legislature of a state might exercise within the state; and it may vest and distribute the judicial authority in and among the courts and magistrates and regulate judicial proceedings before them so long as it does not contravene the Constitution of the United States.⁶⁵ There is no division here between state and national powers; all of these powers alike are vested in the national government. When Congress acts, it is legislating for the entire United States.

⁶⁰ 48 USC 1453, 1454, 1458, 1462, 1463, 1464, 1465, 1471; *Ex parte Moran* (Okla.), 144 Fed. 594, 75 C. C. A. 396.

⁶¹ See *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862; *Haavik v. Alaska Packers Ass'n*, 263 U. S. 510, 68 L. ed. 414; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016.

⁶² Const. Art. I, § 8, cl. 17.

⁶³ *District of Columbia v. Murphy*, 314 U. S. 441, 86 L. ed. 329.

⁶⁴ 10 USC 189-190.

⁶⁵ *Capital Traction Co. v. Hof*, 174 U. S. 5, 43 L. ed. 873; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 233; *Cohen v. Virginia*, 6 Wheat. 424, 5 L. ed. 257; *Shoemaker v. United States*, 147 U. S. 300, 37 L. ed. 170.

The power of Congress here, as elsewhere in the United States, is limited by all the express guarantees of individual rights set forth in the Constitution. For example, Congress could not enact a statute dispensing with trial by jury, or establishing religion or pass an *ex post facto* law.⁶⁶ Congress does, however, have the same police power as the states. It may enact all legislation and make all regulations necessary to protect the public peace, morals, safety, health and comfort of the people of the district. The people enjoy all the guaranties respecting life, liberty and property, which protects the people of the states.⁶⁷

The courts of the District of Columbia are of a dual and anomalous nature. They were created by Congress under Article III. of the Constitution for Federal purposes; and also for local purposes under the power of Congress over the District of Columbia. Although they are classified as constitutional courts, their powers are not limited to justiciable cases and controversies. They have, in addition, quasi-judicial and administrative jurisdiction.⁶⁸

In respect to the judicial and administrative power of these courts, Justice Sutherland stated the rule to be "that they are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior Federal courts located elsewhere in respect of the cases enumerated in Section 2 of Article III. The provision of this section of the article is that the judicial power shall extend to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, *ipso facto*, vested in courts as inferior courts of the United States. The fact that Congress, under another plenary grant of power, has conferred upon these courts jurisdiction over non-Federal causes of action, or over quasi-judicial or administrative matters, does not affect the questions. In other words, it (Congress) possesses a dual authority over the District and may clothe the courts of the District not only with jurisdiction and powers of Federal courts in the several states, but with such authority as a state may confer on her courts."⁶⁹

⁶⁶ *Citizens Savings & Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. ed. 455. *Power Co.*, 261 U. S. 428, 67 L. ed. 731.

⁶⁷ *Moses v. United States*, 16 App. D. C. 433; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106.

⁶⁸ *Kelly v. Potomac Electric*

⁶⁹ *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356. See also *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 74 L. ed. 969.

The courts of the District are the municipal court, the juvenile court, the municipal court of appeals, the District Court of the United States for the District of Columbia and the United States Court of Appeals for the District of Columbia.⁷⁰ In addition, there is located within the District the courts, commissions and boards of the United States, including the Supreme Court. The United States Court of Appeals for the District is a tribunal of the greatest importance in the Federal legal system. In addition to being the appellate court for the District, appeals may be taken to it from the Federal Trade Commission,⁷¹ Tax Court of the United States,⁷² Interstate Commerce Commission,⁷³ Federal Radio Commission,⁷⁴ Federal Reserve Board,⁷⁵ Commission under the Grain Futures Act⁷⁶ and Secretary of Agriculture under the Packers and Stockyards Act.⁷⁷

§ 100. Insular Possessions. Our insular possessions are territories under the dominion and sovereignty of the United States, but not yet incorporated as a part of it. They are appurtenant to and belong to the United States, but are not a part of the United States under the revenue clauses and the other protective clauses of the Constitution. They consist in the main of Puerto Rico, the Philippine Islands, the Canal Zone, the Virgin Islands, Guano Islands, and Guam, Samoa and the Swains Island.

The status of these possessions differs from the territories such as Alaska and Hawaii in that the Constitution has been extended by statute to these territories,⁷⁸ and it has not been extended to our insular possessions. Congress did, however, enact fundamental laws for Puerto Rico and the Philippine Islands providing for an executive department, a legislature, and for a system of courts. These fundamental laws contain statutory bills of rights. These bills of rights are practically identical with the Constitution of the United States, from which they were taken almost verbatim, and their clauses are subject to the same interpretation and construction as are the clauses of the Constitution. The effect of these

⁷⁰ See District of Columbia Code; U. S. Code Congressional Service, Chap. 207.

⁷¹ 28 USC 225 (e).

⁷² 26 USC 1224.

⁷³ 15 USC 21.

⁷⁴ 47 USC 96.

⁷⁵ 28 USC 225 (e).

⁷⁶ 7 USC 9.

⁷⁷ 7 USC 194.

⁷⁸ 48 USC 23, 495; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252.

laws has been to confer upon possessions many of the attributes of quasi-sovereignty possessed by the states.⁷⁹

The other possessions are governed under statutes enacted by Congress, but their governments are more those of dependencies than are those of Puerto Rico and the Philippines.⁸⁰

The Constitution makes no provision for the acquiring of territory or for the government of possessions, and authority to do so is derived from the treaty-making power. In addition the power to declare and carry on war, and the power to make acquisitions of territory by conquest, by treaty and by cession are incidents of national sovereignty.⁸¹ These powers are inherent in the government of the United States.⁸²

§ 101. Property Owned by the United States. The Constitution makes provision for the acquisition of territory for forts, arsenals, etc. This provision is as follows:

“The Congress shall have power . . . to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.”⁸³

Under this provision the Federal government has acquired territory in every state of the Union. In most cases the territory has been acquired with the consent of the state; in some cases it has been acquired without consent. In all instances in which the consent of the state has been secured, the land purchased under this provision falls within the exclusive legislative powers of Congress. The jurisdiction of the state has been completely ousted. In the instances in which the state has not consented, the ownership or possession of the Federal government is that of a proprietor, and the state has retained exclusive political jurisdiction, unless the Federal government has acquired political jurisdiction in some

⁷⁹ 48 USC 1001 et seq., 1301 et seq., 1391 et seq., 1411 et seq.; Puerto Rico v. Shell Co., 302 U. S. 253, 82 L. ed. 235.

⁸⁰ 48 USC 737, 1008.

⁸¹ Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088; DeLima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041;

Carino v. Philippine Islands, 212 U. S. 449, 53 L. ed. 594; Balzac v. Porto Rico, 258 U. S. 298, 66 L. ed. 627.

⁸² United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

⁸³ Const. Art. I, § 8, cl. 7.

other way.⁸⁴ The consent of the state may be given either before or after acquisition of the property by the United States.⁸⁵

The question of Federal or state jurisdiction is important, especially upon the right of taxation. In the event of exclusive Federal jurisdiction the state has no right or authority to tax the property, or to levy any taxes within the district.⁸⁶ But where property was ceded with the reservation that private property could be taxed, the Federal government took the property subject to such reservation.⁸⁷ The scope of the authority reserved to the state depends upon the terms of the grant by the state. Such grants will be liberally construed in favor of the taxing power of the state.⁸⁸ In 1939 the Supreme Court held that an employer within a United States government reservation was liable to the unemployment compensation tax of the state of Arkansas,⁸⁹ and in the following year the Court held that a contractor erecting a post office building on property in New York over which the United States had acquired exclusive jurisdiction was subject to the provisions of the state labor law.⁹⁰ In line with these decisions is the enactment of Congress which provided that no person shall be relieved from liability for sale and use taxes and income taxes in Federal areas after December 31, 1940.⁹¹ But the state has no authority to control the sale of liquor when the general power to govern territory has been ceded by the state to the Federal government.⁹²

The ownership and use of lands for public purposes by the United States, without more, do not withdraw the land from the

⁸⁴ *United States v. Cornell*, 20 Mason 60, 25 Fed. Cas. No. 14867; *United States v. San Francisco Bridge Co.*, 88 Fed. 891; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 531, 29 L. ed. 264.

⁸⁵ *Fort Trumbell, Connecticut*, 13 Op. Atty. Gen. 411.

⁸⁶ *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318, 5 Op. Atty. Gen. 316; *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 74 L. ed. 1091.

⁸⁷ *Fort Leavenworth R. Co. v.*

Lowe, 114 U. S. 525, 29 L. ed. 264.

⁸⁸ *Collins v. Yosemite Park & Curry Co.*, 304 U. S. 518, 82 L. ed. 1502; *Silas Mason Co. v. Tax Commission of Washington*, 302 U. S. 186, 82 L. ed. 187; *Bowen v. Johnston*, 306 U. S. 19, 83 L. ed. 455.

⁸⁹ *Buckstaff Bathhouse Co. v. McKinley*, 308 U. S. 358, 84 L. ed. 322.

⁹⁰ *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 127 A. L. R. 821.

⁹¹ 4 USC 13-15.

⁹² *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383, 88 L. ed. 814.

jurisdiction of the state. "It is not unusual," observed Justice Van Devanter, "for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."⁹³ Usually the state in giving its consent reserves the right to serve the processes of the state courts within the district. The purpose of this reservation is to prevent the property from becoming the haven or asylum of criminals and other fugitives from justice.⁹⁴ The processes referred to in the reservations are those which are purely personal. Mesne or final processes touching real and personal property are excluded.⁹⁵

This provision does not grant the power to purchase or otherwise acquire territory generally, such as the purchase of the Louisiana Territory in 1803, and also the purchase of Florida and Alaska, should not be emphasized as being derived from this clause. Heretofore authorities have referred to this power as a general power, in effect, resulting from and necessarily growing out of the aggregate powers delegated to the national government by the Constitution, such as the power to make war, to make treaties with foreign nations, to acquire ceded territory and to provide for its government. In reality, this power relates to foreign and external affairs and should be classified as an inherent power of the national government.⁹⁶

⁹³ *Surplus Trading Co. v. Cook*, 281 U. S. 647, 74 L. ed. 1091. See also *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688.

⁹⁴ *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 533, 29 L. ed. 264;

Divine v. Unaka Nat. Bank, 125 Tenn. 98, 140 S. W. 747, 39 L. R. A. (N. S.) 586.

⁹⁵ *Martin v. Honse*, 39 Fed. 694.

⁹⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

CHAPTER 11

DISTRIBUTION OF FEDERAL POWERS

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, or execute them in a tyrannical manner.

—Montesquieu

§ 102. **Classification of Powers.** The Constitution of 1787 established three co-ordinate departments of the Federal government and distributed among them the powers confided to that government by the people. Each of the departments was dealt with in a separate article, the legislative being the first, the executive the second, and the judicial the third. The first was to pass the laws, the second to approve and execute them and the third to expound and enforce them.¹ Generally speaking, each of these departments was separate from the others.²

There is a significant difference in the grant of powers to the departments. Article I., treating of legislative powers, does not make a general grant of legislative powers, but vests in Congress "all legislative powers herein granted," and later enumerates the powers. Article II. vests the executive powers in the President. Article III. states that "the judicial power of the United States shall be vested in a Supreme Court and such inferior courts as Congress may from time to time ordain and establish." By reason of this language, the courts have held that the executive department is vested with all executive powers and that the judicial department is vested with all the judicial powers of the Federal government, but that the legislative department can exercise only

¹ Evans v. Gore, 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519.

² Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Dred Scott v. Sandford, 19 How. 393, 15 L. ed. 691;

O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356; Searle v. Jensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.

those powers specifically granted or implied. This language is the origin of the doctrine of enumerated powers.³

§ 103. Separation of Powers. The theory of the separation of powers was not new to the framers of the Constitution. It may be traced to the middle ages and even to Cicero and to Aristotle, who discussed it in Book Six of his treatise on politics. In 1748 Montesquieu published his great classic *The Spirit of Laws* (*L'Esprit des Lois*) in which he declared that the three departments must be kept separate in order that the liberty of the people might be preserved.⁴ Then came Blackstone's *Commentaries* published in 1765-1769, which declared: "In all tyrannical governments, the supreme magistracy, or the right of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. . . . Were the judicial joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance of the legislative."⁵

The state constitutions had been built upon this plan, and from these sources the members of the Constitutional Convention adopted it as a basic principle into the Constitution of 1787.⁶ In fact, this theory was unquestioned by the statesmen and jurists of the Convention. It was subscribed to by Madison, Hamilton, Wilson, Washington, Morris and other leaders. Madison and Hamilton discussed it in the *Federalist Papers*.⁷ In the Convention Madison asserted "If it be a fundamental principle of free government that the legislative, executive and judiciary powers should be

³ *Kansas v. Colorado*, 206 U. S. 80, 76 S. W. (2d) 1025, 96 A. L. R. 46, 51 L. ed. 956; *McCulloch v. Maryland*, 4 Wheat. 405, 4 L. ed. 601.

⁴ *State v. Bates*, 96 Minn. 110, 104 N. W. 790, 113 Am. St. Rep. 612; *Langever v. Miller*, 124 Tex.

⁵ 1 Blackstone Comm. (4th Ed.) 134.

⁶ *State v. Brill*, 100 Minn. 499, 11 N. W. 294, 10 Ann. Cas. 425.

⁷ *The Federalist* Nos. XLVII-LI.

separately exercised; it is equally so that they be independently exercised.”⁸ In the *Federalist* he wrote “The oracle who is always consulted on this subject is the celebrated Montesquieu.”⁹

This separation of powers, therefore, was not merely a matter of convenience or of governmental mechanism. Its object was basic and vital.¹⁰ It was designed to preclude a commingling of these essentially different powers of government in the same hands.¹¹ This object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon one department certain functions, which by their nature would otherwise fall within the general scope of the powers of another. These exceptions in fact serve to emphasize the inviolate character of the plan.¹²

§ 104. Independence of Departments. Each of the departments are equal and co-ordinate. Each derives its authority through the Constitution from the people and each is responsible, mediately or immediately, to the people for its exercise.¹³ Each department has a sphere of action and, within that sphere, each is supreme. Powers confided to one cannot be exercised by the other.¹⁴ This doctrine of the independence of his departments was supported by Chief Justice Marshall and the distinguished associate justices, Wilson and Story. Story wrote that neither of the departments in reference to the other “ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.”¹⁵

The Supreme Court has held that it is equally important that each department should be kept completely independent of the others. By the term “independent” the court did not mean that the departments should not co-operate with each other. It intended to say that the acts of one should never be controlled by the overpowering force of the other departments. “If it is important

⁸ 2 Farrand, *The Records of the Federal Convention*, 56.

⁹ *The Federalist* No. XLVII.

¹⁰ *Kilbourne v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

¹¹ *Springer v. Philippine Islands*, 277 U. S. 189, 72 L. ed. 845.

¹² *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356.

¹³ *DeChastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

¹⁴ *Montgomery v. State*, 231 Ala. 1, 163 So. 365, 101 A. L. R. 1394.

¹⁵ 1 Story, *Constitution* (4th Ed.) § 530; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356.

thus to separate the several departments of government," remarked Justice Sutherland, "it follows, as a logical corollary, equally important, that each department should be kept equally independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected directly or indirectly, to the coercive influence of either of the other departments."¹⁶

This doctrine has been affirmed and reaffirmed by the courts, and is supported by the latest cases. Whenever a department has obviously overstepped the boundaries of its particular field, the courts have uniformly nullified or stayed the transgression.¹⁷

§ 105. Extent of Powers. The extent of the powers of each department is not specifically defined by the Constitution. It goes no further than to establish the three co-ordinate departments, and to distribute among them the powers confided to the national government by the people.¹⁸ In addition to the inherent powers possessed by the government in foreign and external affairs,¹⁹ each department under the provisions of the Constitution has the following powers: (a) powers expressly granted by the Constitution; ²⁰ (b) powers implied from those granted; ²¹ and (c) powers implied from other implied powers.²²

The extent of the powers of each department has been further discussed in detail elsewhere.²³ In general the extent of the powers cannot exceed those granted or implied or vested in each department by reason of the doctrine of inherent powers. "It is now an established and fundamental principle of constitutional law," asserted Chief Justice Cureton of the Supreme Court of Texas, "that the executive cannot exercise either judicial or legis-

¹⁶ *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356.

¹⁷ *Rathbun v. United States*, 295 U. S. 602, 79 L. ed. 1611; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356.

¹⁸ *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519.

¹⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

²⁰ *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

²¹ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 597.

²² *Ruppert v. Caffey*, 251 U. S. 264, 64 L. ed. 260.

²³ For executive department, see Chap. 13; judicial department, see Chap. 14; and for legislative department, see Chaps. 17 and 18, *infra*.

lative authority; the judicial department cannot be clothed with executive or legislative powers; and the legislative magistracy cannot exercise the functions of either the executive or judicial departments." ²⁴

§ 106. Limitations Upon Legislative Power. The legislative department cannot usurp the powers of the executive and judicial departments. For example, the power to grant reprieves and pardons is an executive function and any attempt on the part of the legislature to interfere with this function would be unlawful.²⁵ The legislature cannot assume judicial powers, and it cannot confer these powers on any body other than the courts.²⁶ It cannot abolish courts established by the Constitution, and it cannot increase or decrease the jurisdiction of these courts.²⁷ It may, however, regulate rules of procedure.²⁸ It may make reasonable regulations for governing contempt of court, but it cannot take away the power of the court to thus protect its authority.²⁹ The legislature may make reasonable regulations for the admission and disbarment of attorneys, but the powers of admission and disbarment are judicial.³⁰

§ 107. Administrative Commissions. Congress as a legislative body has the power to create offices, boards and commissions such as the Interstate Commerce Commission, the Federal Trade Commission, Federal Home Loan Bank Board, Federal Reserve Board and the Federal Power Commission. These boards and commissions may make rules and regulations for the administration of their affairs, but these agencies cannot make the violation of their regulations punishable as a criminal offense. The authority of

²⁴ *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A. L. R. 836. See also *State v. Shumaker*, 200 Ind. 623, 157 N. E. 769, 58 A. L. R. 954.

²⁵ *Fite v. State*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520.

²⁶ *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A. L. R. 836; *Stockman v. Leddy*, 55 Colo. 24, 129 Pac. 220, Ann. Cas. 1916 B 1052.

²⁷ *Marbury v. Madison*, 1 Cr.

137, 2 L. ed. 60; *Klein v. Hutton*, 49 N. D. 248, 191 N. W. 485.

²⁸ *Record Pub. Co. v. Monson*, 123 Wash. 569, 213 Pac. 13.

²⁹ *Bryan v. State*, 99 Ark. 163, 137 S. W. 56, Ann. Cas. 1913 A 908; *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

³⁰ *In re Bruen*, 102 Wash. 472; 172 Pac. 1152; *In re Collins*, 188 Cal. 701, 206 Pac. 990, 32 A. L. R. 1062.

these boards and commissions is confined to such regulations and orders as are necessary to the efficient administration of the board's affairs.³¹

The duties of these commissions are a mixture of the powers of all three branches of the government. In some respects, they are political; in others they are legislative; and in still others they are quasi-judicial.³² These commissions will be discussed more specifically later.³³

§ 108. Limitations on Executive Power. The executive department cannot constitutionally assume the powers and functions of the legislative department or the judicial department. The chief executive cannot repeal laws and he has no right to undertake indirect repeals through pardons or paroles because he does not believe in the policy of the law.³⁴ He may present and recommend bills to the legislature, but they must be introduced in the regular way.³⁵ An executive cannot set aside a statute or defy it. He must obey it.³⁶ He may expend only the funds voted by the legislature or an initiative measure.³⁷ Executives may, however, hold public hearings for the purpose of granting or refusing licenses, or to enforce regulations.³⁸ In general, no officer of the executive department can in any way limit the powers conferred upon the legislature by the Constitution.³⁹

The executive department cannot usurp the functions of the courts, such as adjudging a statute to be unconstitutional,⁴⁰ or preventing the courts from functioning.⁴¹ He is forbidden to conduct a judicial investigation.⁴²

³¹ *Standard Oil Co. v. United States*, 283 U. S. 235, 75 L. ed. 999.

³² *Humphrey's Executors v. United States*, 295 U. S. 602, 79 L. ed. 1611.

³³ See Chap. 19, *infra*.

³⁴ *Henry v. State*, 10 Okla. Cr. Rep. 369, 136 Pac. 982, 52 L. R. A. (N. S.) 113.

³⁵ *Taylor v. Davis*, 212 Ala. 282, 102 So. 433, 40 A. L. R. 1052.

³⁶ *Henry v. State*, 10 Okla. Cr. Rep. 369, 136 Pac. 982, 52 L. R. A. (N. S.) 113.

³⁷ *Hicks v. Davis*, 97 Kan. 312, 154 Pac. 1030.

³⁸ *Stone v. Fritts*, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147.

³⁹ *Taylor v. Davis*, 21 Ala. 282, 102 So. 433, 40 A. L. R. 1052.

⁴⁰ *Payne v. Providence Gas Co.*, 31 R. I. 295, 77 Atl. 145, Ann. Cas. 1912 B 65.

⁴¹ *Johnson v. Duncan*, 3 Mart. (La.) 530, 6 Am. Dec. 675.

⁴² *Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 200 N. Y. S. 865.

In recent years the powers of the officers of the executive department of the Federal government has been greatly extended. The Secretary of Agriculture may hold hearings of a quasi-judicial nature under the Packers and Stockyards Act,⁴³ and the Secretary of Agriculture formerly conducted quasi-judicial proceedings under the Pure Food and Drug Act. Appeals from these hearings are carried directly to the Circuit Courts of Appeals.⁴⁴ The Attorney General also may hold hearings in deportation proceedings and the findings made are final, except that Congress may enact a statute in effect, overruling his decision.⁴⁵

§ 109: Limitations on Judicial Power. The courts are empowered to interpret the laws, but the judicial department can neither make nor execute them. Neither can it interfere with the other departments.⁴⁶

The judicial department cannot encroach upon the powers of the executive department, and cannot in any way interfere with those powers.⁴⁷ The courts will not review purely executive powers, such as granting pardons. It will not review, through injunction proceedings, the right of a lieutenant governor to perform the duties of the governor.⁴⁸ Likewise the courts will not interfere with the performance of executive duties, especially where the duties involve the exercise of discretion by the executive. For example, the courts cannot, under the guise of exerting judicial power, usurp the administrative power of the Interstate Commerce Commission.⁴⁹

The judicial department may not encroach upon the legislative department. It is the province of the legislature to enact, amend or repeal a statute, and the courts will not, theoretically, by judicial interpretation enlarge, alter or amend an enactment. "The judicial function to be exercised in construing a statute,"

⁴³ 7 USC 194.

⁴⁴ 21 USC 301 et seq.

⁴⁵ 8 USC 155. See Reorganization Plan No. V, approved June 4, 1940, 5 USCA 133t (note).

⁴⁶ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60.

⁴⁷ *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181.

⁴⁸ *State v. Magee Pub. Co.*, 29 N. M. 455, 224 Pac. 1028, 38 A. L. R. 142.

⁴⁹ *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 54 L. ed. 280.

remarked Justice Brandeis, "is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."⁵⁴ The means or methods adopted by the legislature for promoting a public purpose is for legislative determination, and the courts will not interfere with the large discretion of the legislature in promoting the general welfare or in performing the duties entrusted to it by the Constitution.⁵⁵ It is well settled that the courts cannot convene or adjourn the legislature, and that they cannot interfere in any way with the legislative process in enacting laws, or with other legislative functions.⁵⁶

Congress cannot confer jurisdiction upon the Supreme Court of the United States to review the legislative discretion of a public utilities commission in fixing rates so as to enable it to fix the rate which the commission should have made. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," to quote Chief Justice Taft. "That is its purpose and end. Legislation on the other hand looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a new rule for the future, and therefore is an act legislative, not judicial, in kind."⁵⁷

§ 110. System of Checks and Balances. When one speaks of the legislative, executive and judicial departments of our government being separate and independent, he must understand the doctrine in a limited sense. It is not meant that they shall be kept wholly and entirely separate and distinct, without any dependence one upon the other. The true meaning is that the whole power of one of these departments should not be exercised by the persons having the whole power of one or both of the other departments.⁵⁸

In the search of a plan, which would effectually check the possible inroads of the legislature upon the other departments, the

⁵⁴ *Ebert v. Poston*, 266 U. S. 548, 69 L. ed. 435.

⁵⁵ *Allied Architects Ass'n v. Payne*, 192 Cal. 431, 221 Pac. 209, 30 A. L. R. 1029; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780; *Massachusetts & Frothingham v. Mellon*, 262 U. S. 447, 67 L. ed. 1078.

⁵⁶ *French v. Senate of California*, 146 Cal. 604, 80 Pac. 1031, 69 L. R.

A. 556, 2 Ann. Cas. 756; *State v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Fergus v. Marks*, 321 Ill. 510, 152 N. E. 557, 46 A. L. R. 960.

⁵⁷ *Keller v. Potomac Elec. Co.*, 261 U. S. 423, 67 L. ed. 731.

⁵⁸ *The Federalist* No. XLII.

members of the Constitutional Convention decided upon an occasional mixture of powers among the departments.⁵⁹ This plan is known as the system of checks and balances of the Constitution.

More than one hundred years after the adoption of the Constitution this system was described and appraised by Lord Bryce in the following manner. "The Constitution was avowedly created as an instrument of checks and balances," he said. "Each branch of the national government was to restrain the others and maintain the equipoise of the whole. The legislative was to balance the executive, and the judiciary both. The two houses of the legislature were to balance one another. The national government, taking all of its branches together, was balanced against the state governments. As this equilibrium was placed under the protection of a document, unchangeable except by the people themselves, no one of the branches of the national government has been able to absorb or override the others, as the House of Commons has overridden and subjected the Crown and the House of Lords. Each branch maintains its independence, and can, within certain limits defy the others."⁶⁰

After the experience of more than one hundred and fifty years the plan may be said to have been successful. Although there has been a blending of the powers of the three departments, as shall be seen later, the main divisions of powers remain intact both from encroachment by the other departments or through amendment of the Constitution by the people.⁶¹

All state constitutions, while recognizing the principle of the separation of powers in constructing their frameworks of government, have followed the Constitution of the United States in adopting a system of checks and balances.⁶² These systems have likewise remained intact, except as they may have been modified slightly by the adoption of the initiative and referendum in several states.

§ 111. **Checks on Legislative Department.** There are the following checks upon the legislative department:

- (a) The President may veto Acts of Congress, but these vetoes may be overridden by a two-thirds vote of Congress.⁶³

⁵⁹ 1 Story, Constitution (4th Ed.) § 540.

⁶⁰ 1 Bryce, American Commonwealth 393.

⁶¹ *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519; *McCray v. United States*, 195 U. S.

27, 49 L. ed. 78, 1 Ann. Cas. 561.

⁶² *State v. Bates*, 96 Minn. 110, 104 N. W. 790, 113 Am. St. Rep. 612; Thorpe, American Charters, Constitutions and Organic Laws.

⁶³ Const. Art. I, § 7, cl. 2.

- (b) The Supreme Court may declare Acts of Congress unconstitutional.⁶⁴
- (c) Members serve for limited time. Senators serve for six years and members of the House of Representatives serve for two years.⁶⁵
- (d) The salaries of congressmen and other expenses are fixed and provided for by Congress through a legislative act, but the President must approve the act.⁶⁶

§ 112. Checks Upon Executive Department. There is an even greater number of checks upon the executive department.

- (a) The President is required to report to Congress on the state of the union and to recommend such laws as he considers expedient and necessary, but he cannot initiate legislation.⁶⁷
- (b) The President is in charge of foreign relations, but the power to declare war is vested in Congress.⁶⁸
- (c) The President has the power to make treaties with foreign governments, but these treaties must be approved by two-thirds of the Senate.⁶⁹
- (d) The President has power to appoint public officers, but the appointment must be approved by the Senate.⁷⁰
- (e) The President, Vice President and other officers of the executive department are subject to impeachment by Congress.⁷¹
- (f) The term of office of President is limited to four years. Until 1940 custom limited the number of terms to two.⁷²
- (g) The salaries of President and other executive officers and other expenses of the executive department must be voted by Congress.⁷³

§ 113. Checks Upon Judicial Department. Likewise the judicial department is subject to the checks of the other departments and of the people.

- *(a) The Supreme Court may declare an Act of Congress unconstitutional, but Congress may submit the act to the people

⁶⁴ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60. also § 3; Art. I, § 8, cl. 1.

⁶⁵ Const. Art. I, § 2, cl. 1; also § 3, cl. 2.

⁶⁶ Const. Art. I, § 6, cl. 1.

⁶⁷ Const. Art. II, § 3.

⁶⁸ Const. Art. II, § 2, cl. 2;

⁶⁹ Const. Art. II, § 2, cl. 2.

⁷⁰ Const. Art. II, § 2, cl. 2.

⁷¹ Const. Art. II, § 4.

⁷² Const. Art. II, § 1, cl. 1.

⁷³ Const. Art. II, § 1, cl. 7.

through a constitutional amendment. The adoption of the amendment overrules the decision of the Supreme Court. In 1798 the Eleventh Amendment was adopted to overrule the decision in the case of *Chisolm v. Georgia*. The Dred Scott Decision, together with other issues, was rejected by the people, in the Civil War and by the Thirteenth, Fourteenth and Fifteenth Amendments. In 1913 the Sixteenth Amendment, providing for an income tax, was adopted. This amendment voided the decision of the Supreme Court in the case of *Pollock v. Farmers Loan & Trust Co.* The Court had held an income tax a direct tax and void unless apportioned as required by the Constitution. The Sixteenth Amendment provided:

“Congress shall have power to lay and collect taxes on income from whatever source derived, without apportionment among the several states and without regard to any census enumeration.”⁷⁴

- (b) The judges of the Supreme Court are appointed by the President, with the approval of the Senate.⁷⁵
- (c) The judges of the Supreme Court and other federal courts are subject to impeachment by the House of Representatives and to trial by the Senate.⁷⁶
- (d) The salaries of judges and employees and other expenses must be voted by Congress and approved by the President.⁷⁷
- (e) Federal courts may convict persons accused of crime, but the President holds the power of pardon.⁷⁸
- (f) Congress, with the approval of the President, may increase or decrease the membership of the Supreme Court, and create or abolish inferior Federal courts.⁷⁹

§ 114. Complete Separation Impossible. The division of governmental powers into legislative, executive and judicial is not an exact classification. It is abstract and general and is true in theory, but in actual practice complete separation is impossible.⁸⁰

⁷⁴ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; Const. Art. V; *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; Amendment XI: *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. ed. 1108; Amendment XVI.

⁷⁵ Const. Art. II, § 2, cl. 2.

⁷⁶ Const. Art. II, § 4.

⁷⁷ Const. Art. III, § 1.

⁷⁸ Const. Art. III, § 2; Art. II, § 2, cl. 1.

⁷⁹ Const. Art. III, § 1.

⁸⁰ Story, Constitution (4th Ed.) § 525.

There are many powers, which may be assigned to one or the other of the two departments, or delegated to a commission created for the purpose of administering a law or a regulation. In fact, the many complex relations created by modern society and business have produced many situations which can be adequately met only by investing in the same administrative offices or bodies powers inherently partaking, at least to some extent, of any two or of all three of the departments. For example, such commissions as the Federal Trade Commission and other commissions, bureaus and officers exercise both administrative and quasi-judicial functions.⁸¹

Congress may not only create these instrumentalities, but it may delegate to them the power of making subordinate rules and the additional power of determining facts to which the policy of Congress shall apply. Such regulations, however, are valid only when subordinate to a legislative policy sufficiently defined by statute and when found to be within the framework of such policy. A delegation of legislative power to an administrative officer is not valid when the public good only is fixed as a standard for the officer's actions.⁸²

The true meaning of the theory of the separation of powers, as it has been modified by practice, is that the whole power of two or more departments shall not be lodged in the same hands, whether of one or of many, and that each department shall have and exercise such inherent powers as shall protect it in its performance of its major as well as its minor duties.⁸³

§ 115. Blending of Powers. The evolution of our Constitution has resulted in a singular blending of powers instead of a separation as provided by the doctrine of Montesquieu.

The plan of checks and balances as adopted in 1787 in effect provided (a) that the major governmental powers should not be confined to one person or one body, but should be given to separate departments;⁸⁴ (b) that each should be independent of the other in its own proper sphere;⁸⁵ (c) that each department should be

⁸¹ *State v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523.

⁸² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 388.

⁸³ *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *Indiana v. Shumaker*, 200 Ind. 716, 164 N. E. 408, 63 A. L. R. 218;

Illinois v. White, 334 Ill. 465, 166 N. E. 100.

⁸⁴ *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253. See also § 104, this chapter.

⁸⁵ *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. See also § 104, this chapter.

forbidden to encroach upon the rights of the others;⁸⁶ and (d) that each department should act as a check upon the exercise of governmental powers of the others.⁸⁷

The complex relations of modern society, however, proved that our Founding Fathers did not go far enough. It has been necessary to further modify this doctrine. Today our government is first of all a government capable of functioning as such, and only secondarily one of separated powers. It is much more important at the present time and under present conditions that our government function efficiently as a government than that the details of its operation be always consistent with the prescribed theory of what it should be.⁸⁸

This blending of powers has enabled our Constitution to grow and expand to meet new and unforeseen conditions of government. While it has permitted each department to act as a restraint upon the arbitrary and unwise action of the others, it has also enabled them to effectively and efficiently co-ordinate with each other, working together and carrying into effect conjointly the whole power of the nation. ✓

§ 116. Checks by and Upon the States. The plan of checks and balances was extended to include the relationship of the Federal government and the states. Each is a check upon the other. Except in foreign and external affairs, the Federal government theoretically can exercise only those powers expressly and impliedly granted by the people and carved from existing state powers.⁸⁹ On the other hand, the states are forbidden to exercise certain powers granted to the Federal government. For example, no state can enter into a treaty or an alliance; nor coin money; nor emit bills of credit;⁹⁰ nor lay imposts or duties on exports or imports; nor engage in war.⁹¹ The Federal government controls interstate and foreign commerce, but intrastate commerce in the main is under the control of the states.⁹²

Speaking of the balance of authority between these governments, former President Taft wrote: "The central government was to

⁸⁶ O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356. See also § 104, this chapter.

⁸⁷ See § 110, this chapter.

⁸⁸ Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446; State v. Public Service Commission, 94

Wash. 274, 162 Pac. 523; State v. Bates, 96 Minn. 110, 104 N. W. 790, 113 Am. St. Rep. 612.

⁸⁹ See Chap. 17, §§ 189, 190, 192.

⁹⁰ Const. Art. I, § 10, cl. 1.

⁹¹ Const. Art. I, § 10, cl. 2.

⁹² Const. Art. I, § 8, cl. 3.

have the power over foreign relations without interference by the states, complete power over war and peace, independent power to tax and raise money, and the absolute power over commerce, foreign and national. The states retained the wide field of local government. To this balance of authority is due the permanence of our republic—Confederations like ours have usually gone to destruction either through the expansion of the national authority into an arbitrary and tactless exercise of power, or through the paralyzing of needed national strength by the encroachment of constituent states.”⁹³

§ 117. **Effect on State Governments.** The Constitution of the United States does not require the separation of powers in state governments. A state may distribute its powers as it sees fit. A state constitution may provide for the delegation of powers from one department to another, or its legislature might delegate to commissions, boards or officers any legislative function within its province.⁹⁴

There is this limitation upon the state's power. The state cannot violate the essential demands of the due process clause, and it cannot transgress the restrictions of the Federal Constitution applicable to state authority.⁹⁵ These restrictions relate to the commerce clause, a republican form of government and the prohibitions upon the states expressly or impliedly set forth in the Constitution. So long as the state stays within these limitations, the Constitution of the United States has no voice upon the subject. Speaking of this doctrine, Justice Cardozo in a recent case remarked: “The statute challenged is one adopted by the state. This removes objections that might be worthy of consideration if we were dealing with an Act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Even if it were, the enforcement of that guaranty according to the settled doctrine is for Congress, not the courts.”⁹⁶

⁹³ 1 Const. Rev. 68.

⁹⁴ *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. ed. 835; *State v. Brill*, 100 Minn. 499, 111 N. W. 294, 10 Ann. Cas. 425.

⁹⁵ *Crowell v. Benson*, 285 U. S.

22, 76 L. ed. 598; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446.

⁹⁶ *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. ed. 835.

Every state has, expressly or impliedly, some form of separation of powers among legislative, executive and judicial departments. In some states, however, the line of demarcation is not definitely drawn, and there is a region of authority, alternative and concurrent, the boundaries of which are fixed by no definite rule. In these states we may find local boards, tribunals and other officers exercising functions partly legislative, partly executive and partly judicial in nature.⁹⁷ In many states there is a general blending of powers in an even greater degree than has taken place in the case of the Federal Constitution.⁹⁸

⁹⁷ State v. Atlantic Coast Line N. H. 492, 179 Atl. 344, 110 A. L. R. Co., 56 Fla. 617, 47 So. 969, R. 819; Fox v. McDonald, 101 Ala. 32 L. R. A. (N. S.) 693. 51, 13 So. 416, 46 Am. St. Rep.

⁹⁸ Re Opinion of Justices, 87 98.

PART IV

ORGANIZATION AND POWERS OF DEPARTMENTS

CHAPTER 12

ORGANIZATION OF EXECUTIVE DEPARTMENT

The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.

—William Howard Taft

§ 118. **In General.** Article II. of the Constitution, which established the executive department, was designed to provide an organization that would at once secure energy in the executive and safety in the people. The energy was to be accomplished through a single executive endowed with competent powers, and safety was provided by making the executive dependent upon the people and responsible to them.¹ “Energy in the executive is a leading character in the definition of good government,” wrote Hamilton. “It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; the protection of property against those irregular and high handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.”² This design is apparent in the present day organization of the department. The chief executive enjoys not only the powers intended by the framers of the Constitution, but the many

¹ 2 Story, Constitution, 270-271.

² The Federalist No. LXX.

additional powers which have been added to meet the enlarged sphere of activity of the Federal government.³ Today, however, he is more dependent upon the people and more responsible to them than in the days of Hamilton or of Story.⁴

The centralization of authority in a single chief executive necessarily required a distribution of the responsibility for the execution of the powers among many subordinate officers and assistants. That this was the intention of the Founders was evidenced by the fact that Congress, immediately upon organization, provided assistants for the chief executive. On July 17, 1789, it established a department of foreign affairs, which was later known as the Department of State. On August 7, 1789, it provided for a Department of War. At the same session it laid the foundation for a Department of the Treasury. In September, 1789, it made provision for an Attorney General and a Postmaster General. The heads of these departments and offices became the constitutional advisers and the immediate superior ministerial officers of President Washington.⁵

Speaking of the execution of the laws through assistants, Chief Justice Taft referred to the vesting of executive authority as a grant of power to execute the laws. "The vesting of the executive power in the President was essentially a grant of power to execute the laws," he said, "but the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as a part of his executive power he should select those who were to act for him under his direction in the execution of the laws."⁶

Although Article II., Section 2 of the Constitution did no more than recognize the existence of official advisers, ministers, consuls, and other officers, it contemplated a complete organization of the executive department,⁷ and such an organization has been completed through acts of Congress.⁸ It consists of the President; Vice President; Ten Departments; inferior officers; government service agencies; administrative agencies; and many employees.

³ See Chap. 13, *infra*.

⁴ See Chap. 8, *supra*.

⁵ 6 Op. Atty. Gen. 326 (1854).

⁶ *Myers v. United States*, 272 U. S. 52, 71 L. ed. 160.

⁷ Const. Art. II, § 2, cl. 2.

⁸ See Chap. 6, *supra*.

§ 119. President. The chief executive officer is the President and the Constitution contains the following provision relative to him and to the Vice President.

“The executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and, together with the Vice President chosen for the same term, be elected as follows.”⁹

The President and the Vice President are elected through an elaborate machinery, known as the Electoral College.¹⁰ With the advent of the party system, custom and usage modified the written provisions of Article II. of the Constitution and of Amendment XII., although the Electoral College still exists and functions in its obsolete form so as to provide for the election of the President and the Vice President by states by popular vote. Both the President and the Vice President are subject to re-election.¹¹ The President and Vice President formerly took office on the 4th of March of the year following their election. Under Amendment XX this date has been changed to the 20th day of January.

The duties of the President, in the execution of the laws, in general require his superintendence of their administration.¹² He speaks and acts through the heads of the several departments. The acts of these officers, within the scope of their powers, are in law the acts of the President.¹³

§ 120. Vice President. Section 1 of Article II. of the Constitution provides:

“In the case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve upon the Vice President.”¹⁴

Upon the death or disability of the President during his term of office, the Constitution says that the Vice President shall discharge

⁹ Const. Art. II, § 2, cl. 2.

¹⁰ See Const. Art. II, §§ 2-5 and Amendment XII. See also Amendment XX, § 4 (further provision for the election of the President by the House of Representatives, and for the election of the Vice President by the Senate).

¹¹ See Chap. 8, *supra*.

¹² *Myers v. United States*, 272

U. S. 52, 71 L. ed. 160; *Williams v. United States*, 1 How. 290, 11 L. ed. 135.

¹³ *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Williams v. United States*, 1 How. 290, 11 L. ed. 135; 5 USC 133-133r; 3 USC 45a.

¹⁴ Const. Art. II, § 1, cl. 6.

the powers and duties of the President. Custom, however, has decreed that, upon the death of the President, he shall become the President of the United States.¹⁵

Amendment XX., adopted in 1933, made further provision as to the status and duty of the Vice President in the event that the President had died or should not have been chosen or should have failed to qualify at the beginning of his term. Section 3 provided that if at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified.

There has been no construction of the phrase "inability to discharge the powers and duties of said office," and neither the Constitution nor Congress has established a tribunal to decide when, as defined by the Constitution, the President was disabled and unable to discharge his duties, and when the Vice President should undertake to discharge the duties of the President.¹⁶

The Vice President is the second executive officer of the nation. His major duty is to preside over the Senate. Under several Presidents, the Vice President has been invited to meet with the Cabinet, and at times has been invited to perform other noteworthy governmental services.¹⁷

§ 121. Presidential Succession. The Constitution has placed upon Congress the responsibility of fixing the order of succession of the officers who shall act as President beyond the Vice Presidency.¹⁸ Accordingly, Congress, on January 9, 1886, enacted a statute which provided that upon the death, resignation, or inability of both President and Vice President, members of the cabinet shall act as President in the following order: (a) Secretary of State; (b) Secretary of Treasury; (c) Secretary of War; (d) Attorney General; (e) Postmaster General; (f) Secretary of the Navy; and (g) Secretary of the Interior. To this date no member of the cabinet has acted as President.¹⁹

If Congress is not in session, or will not meet within twenty days, at the time one of these officers begins his duties, the statute re-

¹⁵ See Chap. 8, § 69, *supra*.

¹⁶ See Chap. 8, § 70, *supra*.

¹⁷ Const. Art. I, § 3, cl. 4.

¹⁸ Const. Art. II, § 1, cl. 6.

¹⁹ 3 USC 21.

quires him to call a session to meet within twenty days. This statute does not provide that the Secretary shall become President, and it is problematical whether he would succeed to the Presidency as the Vice President has done.²⁰

Amendment XX. further empowered Congress to provide who shall act as President and who shall act as Vice President in the event either or both of these officers shall have failed to qualify, but it has enacted no statute under this provision.

§ 122. Departments of Government. In order to assist the President in executing the laws, Congress has created the Department of State; the Department of War; the Department of Treasury; the Department of Justice; Post Office Department; Department of Navy; Department of Interior; Department of Agriculture; Department of Commerce and the Department of Labor. The chief officer of these departments, except two—Postoffice and Justice—is the Secretary. These two departments are headed by the Postmaster General and the Attorney General respectively. All of these officers are appointed by the President with the approval of the Senate.

Each department is empowered to issue rules and regulations to assist it in the performance of the duties assigned to it. These rules and regulations are semi-executive and semi-legislative. Rules and orders of the War Department must be received as the acts of the Commander-in-Chief, and authorized War Department regulations have the force of law.²¹ Although the opinions of the Attorney General are advisory merely, they are followed as a rule of conduct and are generally regarded as law until withdrawn or overruled by the courts.²² The orders, regulations and instructions issued by the Secretary of the Navy, with the approval of the President, have the force of law when not inconsistent therewith.²³ The Postmaster General has the power to promulgate regulations

²⁰ 3 USC 21. See also Chap. 8, *supra*.

²¹ 5 USC 190; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Billings v. United States*, 23 Ct. Cl. 166; *Parker v. United States*, 1 Pet. 293, 7 L. ed. 150; *United States v. Eliason*, 16 Pet. 291, 10 L. ed. 968; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 86 L. ed. 1611; *Billings v. Truesdell*, 321 U. S. 542, 88 L. ed. 917.

²² 5 USC 303-329; 9 Op. Atty. Gen. 36; 20 Op. Atty. Gen. 654; 25 Op. Atty. Gen. 301; *U. S. Bedding Co. v. United States*, 55 Ct. Cl. 459; *United States v. Falk*, 204 U. S. 143, 51 L. ed. 411.

²³ 5 USC 412; *United States v. Jones*, 18 How. 92, 15 L. ed. 274; 23 Op. Atty. Gen. 155; *United States v. Symonds*, 120 U. S. 46, 30 L. ed. 557; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538.

for the handling of the mails. These regulations are controlling and have the force of law.²⁴

The Secretary of the Interior, the Commissioner of Public Lands and subordinate officers, constitute a special tribunal vested with judicial power to hear and determine claims to public lands, with free power to make conveyances to parties entitled thereto.²⁵

§ 123. **Relationship to Executive, Congress.** The relationship of these departments to the executive department, as well as to Congress, has been defined in an opinion of the Attorney General addressed to President Pierce. "The heads of the departments have a threefold relation," he said, "namely, first, to the President, whose political and confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion; second, to the law, for where the rights of individuals are dependent on those acts, then in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct; and third, to Congress, in the conditions contemplated by the Constitution. This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty, and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the government."²⁶

The heads of the departments may appoint assistants and clerks. These assistants may make decisions and perform acts in the name of the department. When these acts and decisions are reduced to writing and filed or recorded among the archives of the department, they are as binding upon the government as though expressly issued or ordered by the head of the department. The decisions and judgments of one department are conclusive upon every other department of the government.²⁷

²⁴ Ex parte Willman, 277 Fed. 819; United States v. Warfield, 170 Fed. 43, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186.

²⁵ 5 USC 485-486; United States v. Winona & S. A. P. R. Co., 67 Fed. 949, aff'd 165 U. S. 463, 41 L. ed. 789.

²⁶ 6 Op. Atty. Gen. 326.

²⁷ 6 Op. Atty. Gen. 326, 583, 587; McCullom v. United States, 17 Ct. Cl. 92, 101; Pierce v. United States, 1 Ct. Cl. 270, aff'd 7 Wall. 666, 19 L. ed. 169.

The heads of departments are subject to the same immunity from civil suits as is enjoyed by the judges of superior courts of record. "In exercising the functions of his office," to quote Justice Harlan, "the head of an executive department keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages."²⁸

§ 124. Other Officers. The phrase "all other officers of the United States" used in the Constitution means all officers of the United States in addition to ambassadors, public ministers, consuls, judges of the Supreme Court, who must be nominated by the President and approved by the Senate. When offices are established and the statute does not specify how the incumbent shall be named, he must be appointed by the President with approval of the Senate. The Constitution has defined the only way in which officers can be appointed, and, if an appointment is made in any other mode, the appointee is not an officer of the United States within the meaning of the Constitution.²⁹

§ 125. Inferior Officers. The term "inferior officers" as used in the Constitution means officers subordinate or inferior to those appointed by the President with the approval of the Senate. "In our opinion," the Court of Claims announced, "the words as used in connection with the other language of the same clause have a plain, definite and intelligible meaning, capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls and judges of the Supreme Court who shall be appointed by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them respectively, whenever Congress thinks proper to do so. Thus it may authorize the President or the head of the War Department to appoint an army officer, because the officer to be appointed is inferior to the one vested with the appointing power. The word 'inferior' is not here used in . . . the sense of petty or un-

²⁸ *Spaulding v. Vilas*, 161 U. S. Fed. 185; 18 Op. Atty. Gen. 409; 483, 40 L. ed. 780; 20 Op. Atty. United States v. Monat, 124 U. S. Gen. 575. 303, 31 L. ed. 463.

²⁹ *Seully v. United States*, 193

important . . . but it means subordinate or inferior." Inferior officers range from assistants appointed by the heads of departments to army chaplains, masters in chancery, income tax inspectors and letter carriers.³⁰

§ 126. Government Service Agencies. These agencies are engaged in the administration of the affairs of the government. They are concerned with budget making; with the control of expenditures; with accounting; with the classification of employees; with statistical and planning work; and with research in the preparation of national plans for the conservation and development of our natural resources; with the procurement and distribution of property, materials and supplies used in government service; and with the administration of public buildings, national parks and other government property.

§ 127. Administrative Agencies. These agencies relate to the administration of the affairs of the government as these affairs more directly concern and affect the people generally. Among the more permanent of these agencies are the Federal Home Loan Bank Board, Federal Deposit Insurance Corporation, Railroad Retirement Board, Rural Electrification Administration, Tennessee Valley Authority, and the Veterans Bureau.

The mere listing of these organizations suggests the extent to which they have grown. There are more than one hundred and forty of these agencies. Most of them are directly under the President and the heads of the several departments. In fact there are more than forty statutes bestowing authority and duties of a regulatory nature upon the Agriculture Department. The heads of these departments, as well as the President, may issue rules and regulations and make decisions and orders. While details may be delegated to subordinates, the ultimate responsibility rests upon the head of the department. Some of these organizations are quasi divisions of the several departments under the supervision and control of an administrator and committees. Examples of these are the Bureau of the Comptroller of the Currency in the Treasury Department, the Bituminous Coal Division in the Department of the Interior and the Wage and Hour Division in the

³⁰ Collins Case, 14 Ct. Cl. 569; *tual Life Ins. Co.*, 69 Fed. 462;
10 Op. Atty. Gen. 449; *United McGrath v. United States*, 275 Fed.
States v. McCrory, 91 Fed. 295; 294.
United States v. Northwestern Mu-

Department of Labor. Some of them are corporations, boards and authorities which carry on public enterprises such as the Tennessee Valley Authority and the Inland Waterways Corporation. Others are credit granting agencies as the Reconstruction Finance Corporation and the Farm Credit Administration.³¹

§ 128. Reorganization of Government Agencies. The growth of the administrative system of the government has been so rapid since the beginning of the century that it became impossible to carry on the affairs of the government promptly and effectively, and without waste and lost motion. Presidents Theodore Roosevelt, Taft, Wilson, Harding, Coolidge and Hoover in succession recommended a rearrangement of the various agencies. Upon the recommendation of President Franklin D. Roosevelt, Congress in April, 1939, enacted the Government Reorganization Act, and upon the recommendation of President Truman a second reorganization act was passed in December, 1945.³²

The purpose of these acts was to reduce expenditures; to increase efficiency; to consolidate agencies according to major purposes; to reduce the number of agencies by consolidating those having similar functions and by abolishing such as may not be necessary; and to eliminate overlapping and duplication of effort.

Upon the enactment of the 1939 law, President Roosevelt set about to accomplish three objectives. Expressed in his own words: "The first step is to improve overall management, that is, to do those things which will . . . reduce the difficulties of the President in dealing with the multifarious agencies of the executive branch and assist him in distributing his responsibilities as the chief administrator of the government by providing him with the necessary organization and machinery for better administrative management. The second step is to improve the allocation of departmental activities, that is, those things which will . . . help that part of the work of the executive branch which is carried on through executive departments and agencies. In all, this responsibility to the people is through the President. The third step is to improve interdepartmental management, that is, to do those things which will enable the heads of the departments and

³¹ For a further discussion, see Chap. 19, *infra*.

³² See United States Government Manual issued by the National Emergency Council; Executive Order

No. 6166 relating to Reorganization of Executive Agencies; also Reorganization Plan No. 1 dated July 1, 1939; Laws of 79th Congress, Chap. 582, Public Law 263.

agencies the better to carry out their own duties and distribute their own work among their several assistants and subordinates.”³³

§ 129. Impeachment of Executive Officers. All civil officers are subject to removal from office through the process of impeachment. The Constitution provides:

“The President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.”³⁴

This clause has been interpreted to mean:

- (a) The President and Vice President are subject to impeachment.
- (b) Civil officers subject to impeachment are those appointed and commissioned by the President.
- (c) Officers of the Army, Navy, Marine and Air Corps cannot be impeached because they cannot be properly classed as civil officers.
- (d) A member of Congress is not a civil officer within the meaning of this section.
- (e) All private and unofficial persons are excluded from the operation of this provision.

“Other high crimes and misdemeanors” may be defined as any offense against the Constitution and laws of the United States which, in the judgment of the House of Representatives, renders the accused unfit to hold and exercise his office and is deserving of punishment by impeachment. This judgment, however, should not be based on private malice or revenge and should not be used to punish partisan infidelity or to continue a political party in power. It should not be influenced in any way by political or private antagonisms. This section does not prevent the removal of civil officers by the President for other causes deemed sufficient by him.³⁵

The power to try impeachments and the judgment authorized will be discussed in section 206 of Chapter 17.

³³ 5 USC 133-133r.

³⁵ Const. Art. II, § 4.

³⁴ Message of President Franklin D. Roosevelt to Congress, April 25, 1939.

§ 130. **Civil Service.** Employees and minor officers in Federal civil positions are protected by the civil service acts of the United States. These acts provided that the President should be authorized to prescribe such regulations as would promote the efficiency of the service, and provided further for a civil service commission of three commissioners to be appointed by the President.³⁶ The Commission, thus appointed, was empowered to aid the President to prepare rules to provide for competitive examinations; to select officers according to the results of the examinations; to apportion appointments among the states and territories, including the District of Columbia; to fix the period of probation before any absolute appointment or employment was made; to protect officers and employees under civil service from political influence or coercion; and to provide for notices of appointments, rejections, transfers, resignations and removals. This statutory machinery has been supplemented by a complete code of rules and regulations relating to appointments; to training and promotion of employees; to their discipline and dismissal only after notice in writing; and to retirement allowances.³⁷

The purpose of the civil service acts was to establish a system of merit, fitness and permanency to protect the employees and minor officers of the Federal government in place of the inefficiency, the extravagance and corruption of the "spoils system,"³⁸ and the courts have uniformly held such laws constitutional.³⁹ But civil service rules promulgated by the President do not have the force of law,⁴⁰ and will not be enforced by the courts. The President's power to enforce such regulations rests with his power of removal.⁴¹ The courts will not interfere in the case of the removal of an employee, unless the officer has failed to observe and carry out the procedure as provided by law. They have no authority to inquire into the guilt or innocence of the employee or the truth of the charges upon which he was removed.⁴² Likewise, adminis-

³⁶ 5 USC 631-632.

³⁷ 5 USC 633.

³⁸ *State ex rel Voris v. Seattle*, 74 Wash. 199, 133 Pac. 11, 4 A. L. R. 198; *Phillips v. Metropolitan Park Commission*, 215 Mass. 502, 102 N. E. 717, Ann. Cas. 1914 D 724.

³⁹ *People ex rel. Akin v. Kipley*,

171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *People ex rel. Gullett v. McCullough*, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B 995, 1005.

⁴⁰ *Morgan v. Nunn*, 84 Fed. 551; *Taylor v. Kercheval*, 82 Fed. 497.

⁴¹ *Flemming v. Stahl*, 83 Fed. 940.

⁴² *Levine v. Farley*, 70 App. D.

trative action refusing to give a World War veteran, who had passed the civil service examination, immediate employment under the Honorably Discharged Soldiers' Preference Statute was not subject to review by the courts.⁴³

C. 381, 107 F. (2d) 186; *Golding* ⁴³ *Love v. United States* (C. C. v. United States, 78 Ct. Cl. 682. A.), 108 F. (2d) 43.

CHAPTER 13

POWERS AND DUTIES OF THE PRESIDENT

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.

—Justice Sutherland

§ 131. **Nature of Powers.** In the main the powers vested in the President are political and administrative. In only a few instances may they be classed as legislative or judicial. Speaking of these powers Chief Justice Marshall remarked "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to the country in his political character and to his conscience. . . . They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive."¹

Generally, there is a distinction drawn between political and ministerial duties of an executive officer. The courts will not interfere with political duties, but they will require the performance of purely ministerial duties. While the Supreme Court has required secretaries to perform ministerial duties through the granting of writs of mandamus, such a writ has never been directed to the President of the United States. In 1867 the Supreme Court refused to grant an injunction against President Johnson, Chief Justice Chase saying, "We are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."²

§ 132. **Foreign Affairs.** The powers of the Federal government in foreign affairs are inherent and the President is the constitutional representative of the United States with regard to these relations. He holds a very delicate, plenary and exclusive power.

¹ *Marbury v. Madison*, 1 Cr. 135, 2 L. ed. 60; *Madison*, 1 Cr. 135, 2 L. ed. 60; *Dunlap v. Black*, 128 U. S. 40, 32

² *Mississippi v. Johnson*, 4 Wall. L. ed. 354; *In re Kaine*, 147 How. 475, 18 L. ed. 437; *Marbury v.* 103, 14 L. ed. 345.

He is in charge of our relations with foreign nations and conducts all of our negotiations with them.

Discussing the powers of the President in a leading case, Justice Sutherland observed: "Not only . . . is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospects of success. . . . It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."³

To this statement Justice Douglas added: "The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States. . . . The authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the recognition."⁴

In the execution of these powers the President may employ one or more of the following processes: (a) He may act independently of Congress. For example, in August, 1941, President Roosevelt and Winston Churchill met in conference somewhere on the Atlantic Ocean, signed and announced jointly eight peace aims which were generally accepted as a part of the foreign policies of both the United States and Great Britain.⁵ This conference was held without the consent of Congress and the Senate was not called upon to ratify the international "understanding" adopted; (b) He may proceed under his power to make treaties. Under this

³ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255; MacKenzie v. Hare, 239 U. S. 299, 60 L. ed. 297, Ann. Cas. 1916 E 645.

⁴ United States v. Pink, 315 U. S. 203, 86 L. ed. 796.

⁵ These peace aims illustrate how greatly the President may determine or control the foreign relations

power he must have the approval of two-thirds of the Senate of any treaty agreed upon by him, or his representatives and those of any other nation; and (c) The conditions may be such that he is required to act in conjunction with Congress, or to have his acts supported by legislation. This process must be used when the loan or payment of money to a foreign nation is involved, or foreign commerce is concerned, or it is necessary to declare war, or the exercise of other powers vested in Congress is needed.

Although the powers of the President, while acting alone are very great, especially since the doctrine of inherent powers has

of the nation. They were as follows:

First, their countries seek no aggrandizement, territorial or otherwise; *Second*, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; *Third*, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them; *Fourth*, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; *Fifth*, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic adjustment, and social security; *Sixth*, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance; *Eighth*, they believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving people the crushing burden of armaments. (Signed: Franklin D. Roosevelt and Winston S. Churchill)

Later, after war had been declared against Japan and the Axis Powers, Churchill declared: "The probability since the Atlantic Conference at which I discussed these matters with President Roosevelt, that the United States, even if not herself attacked, would come into the war in the Far East and thus make the final victory assured, allayed some of these anxieties and that expectation has not been falsified by event." (Report to Parliament upon asking vote of Confidence on January 27, 1942.)

been enunciated, the field of his activity is limited. He cannot, when acting independently, do what he cannot do, except when acting with the approval or ratification of the Senate or the Congress or conjointly with these bodies.⁶

§ 133. Military Power. The Constitution provides:

“The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States.”

This section makes the President the commander-in-chief of the army, navy, and air forces, and also of the militia when called into the service of the United States. He acts through the Secretary of War and the Secretary of the Navy, and through the officers in the actual command of the army, navy, and air forces.⁷

The military power of the President should be distinguished from the war powers of Congress.⁸ Congress and not the President is vested with all war powers, except those held by the President as commander-in-chief. Within its field, its powers are supreme. “The war powers, with the exception of those pertaining to the office of commander-in-chief are vested in Congress,” averred former Senator (later Justice) Sutherland lecturing at Columbia University in 1918, “and that body must exercise its own judgment with respect to the extent and character of their use. The advice and counsel of the President should be given great weight, but the acceptance of the President’s recommendations must be the result of intelligent approval and not blind obedience. Any other course involves a double betrayal of official trust—usurpation of power by the President and abdication of duty on the part of Congress.”⁹ For example, Congress has the power to make rules for the government and regulation of the land and naval forces¹⁰ and the power of the President does not extend to the repeal or contradiction of such rules or regulations or of statutes enacted by

⁶ See §§ 133, 135, 204, 235–236, *infra*. See notes 3–4, *supra*. See also *Hampton v. United States*, 276 U. S. 394, 72 L. ed. 624; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 64 L. ed. 194.

⁷ Const. Art. II, § 2, cl. 1; *United States v. Sweeny*, 157 U. S. 281, 39 L. ed. 702; *Martin v. Mott*,

12 Wheat. 19, 6 L. ed. 537.

⁸ See Chap. 18, § 204.

⁹ Sutherland, *Constitutional Power and World Affairs*, 76. See also Hughes, *The Supreme Court of the United States*, 105.

¹⁰ *United States v. Eliason*, 16 Pet. 302, 10 L. ed. 968; *McBlair v. United States*, 19 Ct. Cl. 541.

Congress, nor to the making of provisions of a legislative nature.¹¹ On the other hand Congress has no power to legislate so as to impair the efficiency of the President as commander-in-chief.¹² It is required to vote funds to maintain the military forces.¹³ Congress possesses the sole power to declare war, but the President may recognize the actual existence of a state of war, and employ the army, navy, and air forces to protect the nation.

Summarizing these powers during World War II Chief Justice Stone stated: "The Constitution invests the President as commander-in-chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of the war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of the war."¹⁴

These powers are in no way limited, except that the President may not invade the province of Congress. In the field of actual military operations, he may do whatever is done by civilized nations under the laws and practices of war. His authority is supreme and his decisions are final. They are not subject to review by Congress or any other power. In this capacity he directs the movements of the army, navy, and air forces, and employs them in the manner he deems best to harass, subdue, or conquer the enemy forces. He may invade hostile territory and subject it to the authority of the United States. He may govern this territory temporarily through the military forces. These conquests, however, do not enlarge the boundaries of the union, nor extend to them the protection of the Constitution or our institutions and laws. These benefits can be extended only through Acts of Congress.¹⁵

The President has power to employ secret agents to enter the lines of the enemy and to obtain information respecting the strength and movements of the enemy forces, and the extent and amount of the resources of the hostile nations.

¹¹ 6 Op. Atty. Gen. 10.

¹² *Swain v. United States*, 28 Ct. Cl. 173.

¹³ Const. Art. I, § 8, cl. 11.

¹⁴ Const. Art. I, § 8, cl. 11; *Ex parte Richard Quirin*, 317 U. S. 1,

87 L. ed. 3; *The Prize Cases*, 2 Black. 635, 17 L. ed. 459.

¹⁵ *Fleming v. Page*, 9 How. 603, 13 L. ed. 276; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889.

He has the power to appoint and convene a general court-martial to try offenses, including unlawful belligerency and the charge that a commander of enemy forces failed to discharge his duties in permitting his military forces to commit atrocities and other high crimes against the people of the United States, which crimes by the laws of war are triable by such commission. The convening of such a body is simply giving orders to subordinate officers to assemble as a court and to exercise certain powers conferred upon them by the Articles of War. He has the power also, in conjunction with other nations to establish an international military tribunal to try persons charged with the violation of the laws of war and to enforce international justice. If this power did not exist, it would be impossible to administer military justice as a sovereign nation or as a member of the family of nations. He has no authority, however, to arrest and hold for trial before a court-martial persons not in military service, especially when the civil courts are open.¹⁶

The President, or officers empowered by him, with the approval of Congress may place states or parts of states or territories wholly or partially under martial law. In World War II Hawaii was ruled in this manner from the beginning of hostilities. In the Pacific Coast states the commander of the United States forces ordered dimouts, made provisions for curfew hours and for air raid protection, and directed the exclusion of Japanese aliens and citizens of Japanese ancestry from wide areas. The validity of the curfew orders was appealed to the Supreme Court of the United States, which held that, in the crisis of war or threatened invasion, measures of this nature adopted for the public safety were within the limits of the Constitution.

In order adequately to support the military forces and to organize the industrial, economic, and social life of the nation on a wartime basis, the powers of the President as Chief Executive are

¹⁶ *Totten v. United States*, 92 U. S. 105, 23 L. ed. 605; *Swain v. United States*, 165 U. S. 558, 41 L. ed. 823; *Ex parte Richard Quirin*, 317 U. S. 1, 87 L. ed. 3; *Ex parte Milligan*, 4 Wall. 127, 18 L. ed. 281; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914. On August 8, 1945, an executive agreement was entered into

by the United States, Great Britain, the Soviet Union and France, and later by 14 other nations, to establish an international Military Tribunal to try persons accused of the violation of the laws of war during World War II. In *re Yamashita*, — U. S. —, 90 L. ed. —.

greatly increased during such period. In fact these powers have many of the qualities of a dictatorship. In discussing the numerous regulations, requisitions, and confiscations of World War I, former Senator Sutherland observed: "It will thus be seen that Congress has invested the President with virtual dictatorship over an exceedingly wide range of subjects and activities—a grant of power which, under the great emergency of war, has properly received unhesitating popular approval." Later in World War II, President Roosevelt declared: "The responsibilities of the President in war time to protect the nation are very grave. This total war . . . makes the use of executive power far more essential than any previous war. . . . I cannot tell what powers may have to be exercised in order to win this war. . . . When the war is won, the powers under which I act will automatically revert to the people to whom they belong."¹⁷

§ 134. Power to Grant Reprieves and Pardons. The Constitution provides:

"And he (the President) shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."¹⁸

A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power and the executive power over sentences are readily distinguishable," observed Justice Sutherland. "To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment."¹⁹

This power rests exclusively with the President. Congress cannot grant a pardon, or limit the effect of a pardon granted by the

¹⁷ *Hirabayashi v. United States*, 320 U. S. 81, 87 L. ed. 1774; *Yasui v. United States*, 320 U. S. 115, 87 L. ed. 1793, 146 A. L. R. 1463; Sutherland, *Constitutional Power and World Affairs*, 115; Radio address, September 7, 1942; see also

Ex parte Endo, 323 U. S. 283, 89 L. ed. 243.

¹⁸ Const. Art. II, § 2, cl. 1; *United States v. Benz*, 282 U. S. 304, 75 L. ed. 354.

¹⁹ 19 Op. Atty. Gen. 106; 20 Op. Atty. Gen. 668.

President. Neither can it exclude any class of offenders, but a system of probation and parole existing under an act of Congress does not infringe upon the pardoning power of the executive.²⁰ The power extends to offenses committed in the territories or possessions as well as the states.²¹ It extends to cases arising in the military, naval and air services, as well as to civil life.²²

The power extends to cases involving criminal contempt. It does not, however, extend to cases involving civil contempts only. The character and purpose between these two kinds of contempts are fundamentally different. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.²³

The extent of the pardoning power is similar to that of the British King at the time of the adoption of the Constitution, and we must look to the common law and to English authorities in the interpretation of this clause.²⁴ Under the Constitution, it embraces all offenses against the United States, except cases of impeachment. It includes the power to remit fines, penalties and forfeitures.²⁵ It includes the power to grant a conditional pardon, or to commute a sentence to a milder punishment.²⁷

The effect of a pardon was stated by Mr. Justice Field to reach "both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and dis-

²⁰ *Ex parte Garland*, 4 Wall. 380, 18 L. ed. 366.

²¹ 7 Op. Atty. Gen. 561. See also *Arnett v. Stumbo*, 287 Ky. 433, 153 S. W. (2d) 889, 135 A. L. R. 1488 (governor may restore rights of citizenship in a state of one convicted in Federal Court even though he has not been pardoned by the President).

²² *People v. Bowen*, 43 Cal. 441.

²³ *Ex parte Grossman*, 267 U. S.

87, 69 L. ed. 527; *McCrone v. United States*, 307 U. S. 61, 83 L. ed. 1108.

²⁴ *Ex parte Wells*, 18 How. 311, 15 L. ed. 421.

²⁵ *United States v. Harris*, 26 Fed. Cas. No. 15312; *Ex parte Garland*, 4 Wall. 380, 18 L. ed. 366.

²⁷ 5 Op. Atty. Gen. 370; *Biddle v. Perovich*, 274 U. S. 480, 71 L. ed. 1161.

abilities; and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity."²⁸ Perhaps Justice Field has stated his case a little too strongly. A pardon does not change the past, and it cannot annihilate the fact that the person pardoned was guilty of the offense.²⁹ While it removes the penal consequences,³⁰ it cannot in all cases cause restitution of fines and property.³¹ It will restore a military officer to his former rank,³² and an unconditional pardon restores the competency of a witness to testify in the courts.³³

§ 135. Power to Make Treaties. This power is inherent in the Federal government. As to the execution of the power, the Constitution provides:

"He (the President) shall have power, by and with the consent of the Senate, to make treaties, provided two-thirds of the senators concur."³⁴

The power is unlimited, except as to those restraints which are found in the Constitution of 1787 and in the nature of our government. These limitations are in the main as follows:

- (a) The President cannot enter into any stipulation or treaty calculated to change the character of our government;
- (b) A treaty cannot be inconsistent with the nature and character of our government;
- (c) The President cannot through a treaty do what the Constitution forbids;
- (d) He cannot do that which can only be done by the constitution-making power.³⁵

The treaty-making power of the United States is vested in the President and the Senate. The President negotiates the treaties and the Senate is charged with their ratification. To secure ratification two-thirds of the Senators present must concur. The Senate may ratify a treaty conditionally, attaching to it amendments or reservations. If the President refuses to accept these conditions

²⁸ *Ex parte Garland*, 4 Wall. 380, 18 L. ed. 366.

²⁹ *In re Spenser*, 22 Fed. Cas. No. 13234.

³⁰ *United States v. Klein*, 13 Wall. 147, 20 L. ed. 519.

³¹ *Confiscation Cases*, 7 Wall. 454, 19 L. ed. 196.

³² 12 Op. Atty. Gen. 547.

³³ *Boyd v. United States*, 142 U. S. 453, 35 L. ed. 1077.

³⁴ Const. Art. II, § 2, cl. 2.

³⁵ *De Geofry v. Riggs*, 133 U. S. 266, 33 L. ed. 642.

or reservations, the treaty fails. If he agrees to them, he must submit them to the nation concerned for acceptance or rejection.³⁶

Concerning the respective functions of the President and the Senate, an early report of the Senate set forth: "The President is the constitutional representative of the United States with regard to foreign nations. . . . For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."³⁷

The Constitution prohibits the states from making treaties. It provides:

"No state shall enter into any treaty, alliance, or confederation or grant letters of marque and reprisal."³⁸

A treaty is superior to state constitutions and laws. "Plainly the external powers of the United States are to be exercised without regard to state laws and policies," remarked Justice Sutherland. "The supremacy of a treaty in this respect has been recognized from the beginning . . . if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. To counteract it by the supremacy of the state laws, would bring on the union the just charge of national perfidy, and involve us in war."³⁹ An Act of Congress will supersede a prior treaty, and a subsequent treaty will supersede a prior Act of Congress. Whichever is last in time, Act of Congress or treaty, will prevail. But a later act of Congress must be construed so as not to conflict with a prior treaty if such construction can reasonably be made.⁴⁰

³⁶ *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. ed. 138.

³⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255; 8 U. S. Senate Reports Comm. on Foreign Relations, page 24.

³⁸ Const. Art. I, § 10, cl. 1.

³⁹ *United States v. Belmont*, 301 U. S. 324, 81 L. ed. 1134; *United States v. Pink*, 315 U. S. 203, 86 L. ed. 796.

⁴⁰ *Asakura v. Seattle*, 265 U. S. 332, 68 L. ed. 1041; *In re Stixrud*, 58 Wash. 339, 109 Pac. 343, Ann. Cas. 1912 A 850; *Ex parte Terin*, 187 Cal. 20, 200 Pac. 954, 17 A. L.

If the meaning of a treaty is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and their own practical construction of it. "Treaties are to be liberally construed so as to affect the apparent intention of the parties," Justice Stone observed. "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." Treaties are enforced by the executive department. If a private claim is based upon a treaty, the treaty may become the subject of judicial cognizance and construction by the courts, but the courts cannot inquire into the execution of the treaty or its effect upon public rights.⁴¹

§ 136. Power to Negotiate International Compacts. The President has authority to enter into international compacts without the consent or approval of the Senate. These compacts become the law of the land the same as a treaty, and are superior to state constitutions, statutes, and judicial decrees.

The distinction between a treaty and a compact is not always clearly drawn. A treaty is an agreement or contract between two or more sovereign states, formally signed by duly authorized representatives and solemnly ratified by the supreme power of each state. It concerns mostly matters of general consequence or of a permanent character. A compact, broadly speaking, is an agreement less formal and of less importance. It is confined, as a rule, to administrative matters, as distinguished from policies, and to other matters which are of individual concern only, or are limited in scope and duration. The Supreme Court has held that a commercial reciprocal agreement, although not a treaty requiring ratification by the Senate, nevertheless was an international com-

R. 630; *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798; *Karnuth v. United States*, 279 U. S. 231, 73 L. ed. 677; *Johnson v. Browne*, 205 U. S. 309, 51 L. ed. 816 (no repeal by implication unless treaty and act of Congress absolutely in-

compatible).

⁴¹ *Neilson v. Johnson*, 279 U. S. 47, 73 L. ed. 607; *Chase v. United States*, 222 Fed. 593; *United States v. Sandoval*, 167 U. S. 278, 42 L. ed. 168; *United States v. Pink*, 315 U. S. 203, 86 L. ed. 796; *J. Ribas y Hijo v. United States*, 194 U. S. 315, 48 L. ed. 994.

pact, and was therefore a treaty within the meaning of the act permitting an appeal to the Supreme Court. Examples of compacts are protocols, *modi vivendi*, postal conventions, commercial agreements, and pacts.⁴²

These terms will be defined more particularly. A protocol is an agreed adjustment of an international matter arrived at in negotiations as a basis for a formal treaty. It constitutes a moral obligation only. A *modus vivendi* is a temporary arrangement of affairs between two or more states until the matters in dispute can be settled. A postal convention is an agreement entered into by the Postmaster General, with the approval of the President, with foreign countries for the purpose of perfecting our postal service with such nations. Commercial agreements are those contracts of a minor character relating to the exchange, sale, export or import of goods, wares and merchandise. A pact may be defined as an understanding or stipulation to form some engagement or to modify one already made. A notable pact was the mutual aid agreement during World War II entered into between the United States and the Union of Soviet Social Republics on June 11, 1942.⁴³

§ 137. Power of Appointment. The power of appointing his chief executive assistants, ambassadors, judges and other officers

⁴² United States v. Pink, 315 U. S. 203, 86 L. ed. 796; B. Altman & Co. v. United States, 224 U. S. 583, 56 L. ed. 894. See also United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

⁴³ United States v. Belmont, 301 U. S. 324, 81 L. ed. 1134; Russian Pact. This pact, signed by Cordell Hull, Secretary of State and Maxim Litvinoff, Ambassador, provided: (a) That the United States should continue to supply the Union of the Soviet Social Republics with defense articles; (b) that the Union of the Soviet Social Republics should continue to contribute to the defense of the United States; (c) that defense articles and information transferred under act of

March 11, 1941, would not be permitted to be used by others; (d) that payments required by patent rights would be made; (e) that supplies not consumed or destroyed would be returned; (f) that in the final determination of benefits full cognizance shall be taken of all property, services, etc., provided by the United States; and (g) and that in general the economic objectives of the "Atlantic Charter" of August 14, 1941 between the United States and Great Britain and adhered to by the Union of the Soviet Social Republics on September 24, 1941, should be accomplished. For the provisions of the "Atlantic Charter" see note 5 of this chapter.

is vested in the President by the following provision of the Constitution:

"And he (the President) shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States, whose appointments are not herein provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

"And shall commission all the officers of the United States."⁴⁴

The power of appointment is essentially an executive function. Even though the Constitution had made no provision for appointments, the power would have belonged to the President as the head of the executive department charged to execute the laws.⁴⁵

The power is exercised by and with the consent of the Senate. The Senate cannot originate an appointment. Its full power is confined to a confirmation or rejection, and all nominations fail upon rejection. The Senate may suggest conditions and limitations but it cannot vary a nomination made by the President. Congress may indirectly influence appointments through its power to fix salaries, but attempts to control the appointive power through statutory enactments are deemed directory rather than mandatory.⁴⁶

The exercise of the power is subject to the following limitations: (a) The office must have been created by the Constitution or by Congress; (b) Officers whose election or appointment have been provided for by the Constitution are not subject to appointment by the President; (c) Appointments must be approved by a majority vote of the senators present when the vote upon confirmation is taken; (d) Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.⁴⁷

⁴⁴ Const. Art. II, § 2, cl. 2; Art. II, § 3.

⁴⁵ 12 Op. Att. Gen. 41; Woods Case, 15 Ct. Cl. 151; United States v. LeBaron, 19 How. 73, 15 L. ed. 525.

⁴⁶ 3 Op. Att. Gen. 188; 7 Op.

Att. Gen. 215; Foote v. United States, 23 Ct. Cl. 443.

⁴⁷ United States v. Maurice, 26 Fed. Cas. No. 15747; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; United States v. Monat, 124 U. S. 304, 31 L. ed. 463.

A complete appointment consists of three steps: (a) Nomination by the President; (b) approval by the Senate; and (c) execution and delivery of the commission. The courts, however, have held that the delivery of the commission is a ministerial duty only for the performance of which a writ of mandamus will issue. The Senate cannot reconsider its approval after the President has acted upon the notification of approval received by him and has issued a commission.⁴⁸

The courts have no supervising authority. The act of appointment is the exercise of a political power, and the President or other appointing officer alone must determine the fitness of the appointee and whether or not he is the proper person to receive the appointment.⁴⁹

§ 138. Power to Make Recess Appointments. The President has the authority to fill vacancies which occur during the recess of the Senate under the following clause of the Constitution:

“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session.”⁵⁰

This clause enables the President to make appointments whenever any vacancy exists, and even though it began while the Senate was in session. “The true theory of the Constitution in this particular seems to be this:” wrote the Attorney General to President Johnson in 1866, “that as to executive power, it is always to be in action; and that, to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone. All that is to be looked to is, that there is a vacancy, no matter when it first occurred, and there must be a power to fill it. If it should have been filled whilst the Senate

⁴⁸ *Marbury v. Madison*, 1 Cr. 135, 2 L. ed. 60; *United States v. Smith*, 286 U. S. 6, 76 L. ed. 954.

⁴⁹ *Keim v. United States*, 177 U.

S. 293, 44 L. ed. 744; *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60.

⁵⁰ Const. Art. II, § 2, cl. 3.

was in session, but was not then filled, the omission is no excuse for longer delay, for the public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session."⁵¹

There is a distinction between the terms "nomination" and "appointment." If the Senate is in session, the President nominates an appointee to be later approved by the Senate. If the Senate is not in session the President appoints the appointee to serve until the end of the next session of the Senate. An appointment, even though temporary, enables the appointee to assume the duties of the office, while a nomination is but a step toward a complete appointment.⁵²

The phrase "during the recess," means the period beginning with final adjournment and ending with the convening of the next session of Congress. It does not include temporary adjournments such as are customary over holidays.⁵³

§ 139. Power of Removal. The executive power of the President extends to the removal of executive officers appointed by him. The consent of the Senate to the removal is not necessary, even though such consent was necessary to the appointment. Stated in more concise form the power of appointment to office carries with it the power of removal.

In announcing this doctrine, Chief Justice Taft stated the reasons for it. "In all such cases," he said, "the discretion exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action." Speaking of the ordinary duties of officers, prescribed by statute, he said further "The ability and judgment manifested by

⁵¹ President's Power to Appoint Cl. 593; 23 Op. Att'y. Gen. 599.
to Office, 11 Op. Att'y. Gen. 179.

⁵³ 23 Op. Att'y. Gen. 599.

⁵² Gould v. United States, 19 Ct.

the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them."⁵⁴

This power is not unlimited. Congress may restrict the power of removal to inefficiency, neglect of duty or malfeasance in office. If it has thus restricted the power of the President he may remove an officer only for such causes. The Supreme Court has held that he cannot under such circumstances discharge a member of a commission exercising quasi-legislative and quasi-judicial functions such as the Federal Trade Commission.⁵⁵

§ 140. Power to Advise, Convene and Adjourn Congress. The Constitution provides:

"He (the President) shall from time to time give to Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may on extraordinary occasion convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment he may adjourn them to such time as he shall think proper."⁵⁶

This provision is authority for (a) the President's messages to Congress; (b) the calling of a special session of Congress; and (c) under certain conditions adjourning Congress.

Messages to Congress have been delivered both in written form and orally. Under Presidents Washington and Adams the Chief Executive addressed Congress in person. From the Time of President Adams to the administration of President Wilson, messages were sent to Congress in written form only. The custom was to have it delivered by the President's private secretary. President Wilson re-established the practice of delivering his most important messages by appearing before Congress personally. The messages

⁵⁴ Myers v. United States, 272 U. S. 163; 71 L. ed. 160. See also Morgan v. Tennessee Valley Authority, 115 F. (2d) 940, certiorari denied 312 U. S. 701, 85 L. ed. 1135.

⁵⁵ Humphrey v. United States,

295 U. S. 602, 79 L. ed. 1611. See also Morgan v. Tennessee Valley Authority, 115 F. (2d) 990, certiorari denied 312 U. S. 701, 85 L. ed. 1135.

⁵⁶ Const. Art. II, § 3.

of minor importance are still delivered in written form. In addition to the formal messages of the President Congress frequently calls upon secretaries or department heads to furnish it with documents and other information material to investigations or the enactment of legislation.

The President has unlimited power to convene Congress in special session. In fact, it is customary for him to call Congress into session whenever he believes that the welfare of the nation demands that the Senate and House of Representatives should meet. His power to adjourn Congress, however, is very limited. This power can be exercised only in the event of a disagreement between the Houses as to the time of adjournment. He possesses no general power to dissolve or prorogue the Houses for the purpose of securing elections as is proper under the English Constitution, or for any other purpose.

§ 141. Duty to Receive Ambassadors. The Constitution provides:

“He (the President) shall receive ambassadors and other public ministers.”⁵⁷

The receiving of ambassadors and public ministers relates to the conduct of foreign and external affairs, and these powers of the national government therefore are inherent. As a consequence this provision is merely confirmatory of the power of the Federal government existing at the time of the adoption of the Constitution.

The provision is effective as to the distribution of powers between the executive and legislative departments. It says that the President, rather than Congress or the Courts, shall receive ambassadors and public ministers.

The power to receive ambassadors and ministers includes the power to recognize or to refuse to recognize the rightful government of a foreign country. This recognition may be absolute or conditional. If the ambassador or minister is received by the President, the acceptance of the representative amounts to a recognition of the government. As a corollary to this power the President may request that a foreign nation withdraw its official representative, and, if it refuses, the President may dismiss him.⁵⁸

⁵⁷ Const. Art. II, § 3.

304, 81 L. ed. 255; United States

⁵⁸ United States v. Curtiss-Wright Export Corp., 299 U. S.

v. Pink, 315 U. S. 203, 86 L. ed. 796.

The exercise of the power is exclusively political, and neither the courts nor Congress will interfere either to review or to influence or control the decision of the President. The reasons for receiving or refusing to receive or for dismissing a representative may be political, the President acting for the welfare of the nation, or they may be purely personal.

Recognition of a government, which originates in revolution or revolt as the *de jure* government of the country validates all the actions and conduct of the government so recognized from the commencement of its existence, and the courts will take judicial notice of the recognition, whether made through receiving the ambassadors or ministers or through a formal treaty.⁵⁹

§ 142. Duty to Execute the Laws. The President is charged with the duty of executing the laws. The Constitution provides:

"He shall take care that the laws are faithfully executed."⁶⁰

This duty of the President is not limited to the enforcement of the Acts of Congress or of the statutes of the United States, but includes the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution.⁶¹ It is the duty of the President to see that the other executive and administrative officers faithfully perform their duties, but he has no more power to add to or subtract from the duties imposed by law upon subordinate officers than those officers have to add to or subtract from his duties.⁶²

The fact that every officer in every branch of the executive department is under the exclusive control of the President does not prevent Congress from imposing upon such officers any additional duties which it thinks proper, and which are not repugnant to any rights secured and protected by the Constitution. In such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President, and he cannot forbid their performance. This is especially true when the duty enjoined is of a mere ministerial character. If the President could forbid the execution of such laws he would be clothed

⁵⁹ *Oetjen v. Central Leather Co.*, 246 U. S. 304, 62 L. ed. 733; *Ricaud v. American Metal Co.*, 246 U. S. 304, 62 L. ed. 733.

⁶⁰ Const. Art. II, § 3.

⁶¹ *In re Neagle*, 135 U. S. 1, 34 L. ed. 55.

⁶² 19 Op. Atty. Gen. 686.

with powers which would enable him to control or defeat the legislation of Congress or paralyze the administration of justice.⁶³

It is the duty of the President to aid the judicial authority, if it is resisted by a force too strong to be overcome without the aid of the executive arm. In exercising this power he acts in subordination to the judicial authority, assisting it to execute its process and enforce its judgments.⁶⁴

§ 143. Emergency Powers Over Business. In addition to the powers specifically vested in the President by the Constitution, Congress has granted to him extensive extraordinary powers over business to be used in the event of war or other emergency. These powers in the main relate to the control of radio communications; to the control of the telegraph and telephone and transportation systems; to the manufacturing industry; to the Panama Canal; to foreign exchange; to banking and monetary powers; to water power projects; to the generation and transmission of electric energy; and generally to the control of public utilities.⁶⁵

Radio. In 1934 Congress gave the President extraordinary powers over the radio. By statute it provided that "upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe upon just compensation to its owners."⁶⁶

⁶³ *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181.

⁶⁴ *Ex parte Merryman*, 17 Fed. Cas. No. 9,487.

⁶⁵ *Dantzler Lumber Co. v. Texas & P. R. Co.*, 119 Miss. 328, 80 So. 770, 4 A. L. R. 1669. As to compensation for property seized by

government under its war powers, see *Davis v. Newton Coal Co.*, 267 U. S. 292, 69 L. ed. 617; *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 67 L. ed. 664; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 68 L. ed. 904.

⁶⁶ 47 USC 606.

Telegraph and Telephone. The President's power over telegraph and telephone lines is more limited, and may be exercised only in the event of war. "During the continuance of a war in which the United States is engaged," the statute provided, "the President is authorized, if he finds it necessary for national defense and security, to direct that such communications as in his judgment may be essential to national defense and security shall have preference or priority with any carrier subject to this chapter." The extent of the powers here defined is not clear, but under them the President enforced a strict censorship in World War II and provided for a system of priorities which he deemed necessary for national defense and for the successful prosecution of the war.⁶⁷

Transportation Systems. In 1916 Congress, anticipating our entry into the first World War, vested the President with the power of controlling our transportation systems. The enactment read: "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, and for such other purposes connected with the emergency as may be needful or desirable."⁶⁸ Immediately after this war Congress gave the Interstate Commerce Commission power in emergencies to direct priorities in transportation and movement of traffic; to require joint or common use of terminals and tracks; and to make such reasonable directions with respect to the use of cars, locomotives and other vehicles as will best serve the public interest. In time of war or threatened war the President may certify that it is essential to national defense and security that certain traffic shall have priority, and the Commission must direct that such priority be afforded.⁶⁹ The decision of the Commission or of the President that an emergency exists is final.⁷⁰

Manufacturing Industries. The President's power over manufacturing plants or industrial concerns is greater than his powers

⁶⁷ 47 USC 606.

⁶⁸ 10 USC 1361.

⁶⁹ 49 USC 1 (15).

⁷⁰ *Baltimore & O. R. Co. v. Lambert Run Coal Co.*, 267 Fed. 776.

over our transportation systems. In time of war or when war is imminent he is empowered by statute "to place an order with any individual, firm . . . or organized manufacturing industry for such product or materials as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual firm, etc. . . . Compliance with all such orders for products or material shall be obligatory on any individual, firm . . . or manufacturing industry or the responsible head thereof, and shall take precedence over all other orders." If such firm or industry shall refuse to comply with the demand of the President or the Secretary of War, the President, through the Ordinance Department of the Army, may take immediate possession of such industry and its plants.⁷¹ This power relates to the manufacture of arms, ammunition, and all necessary supplies and equipment for the Army. Under this statute the President is empowered to seize the large automobile plants, ammunition plants, tractor plants, airplane construction plants, railroad equipment plants, and the plants of many other major industries. During World War II this power was exercised in several instances.

Panama Canal. In time of war in which the United States is engaged or when war is imminent the President may assume exclusive authority over the Panama Canal. He is required to designate an officer of the Army who shall exercise jurisdiction over the operation of the Canal, including the entire control of the government of the Canal Zone. This officer shall perform all duties in connection with the civil government of the zone, which is to be treated and governed as an adjunct to the Canal.⁷²

The President has construed the phrase "when war is imminent" in a liberal manner. Immediately upon the outbreak of World War II, President Roosevelt appointed an officer to take charge of the Canal and its government under the authority granted by this enactment on the theory that it was necessary to guard and protect the Canal.

Banking and Monetary Powers. The President is vested with extraordinary powers over our banking and monetary systems. In 1917 Congress gave the President extensive powers, if he should find it compatible with the safety of the United States and with

⁷¹ 50 USC 80.

⁷² 48 USC 1306, 1307.

the successful prosecution of the war, to investigate, regulate and prohibit any transactions in foreign exchange and the export, hoarding, melting, or earmarking gold and silver coin, and the transfers of indebtedness between United States and any foreign country.⁷³ With this statute as authority, the President issued a proclamation on March 5, 1933 closing the banks of the United States, even though the nation was not at war, and suffered only from an economic emergency.

On March 9, 1933 Congress remedied this defect by enacting a law approving the action of the President four days previously, and also vesting the President with powers over the banking system which may be exercised in times of emergency as well as when the nation is at war. This enactment provides that, in order to protect the National Banking System, the Federal Reserve System and interstate commerce from the "burdens and obstructions resulting from the receipt on an unsound and unsafe basis of deposits subject to withdrawal by check, during any emergency period as the President of the United States may prescribe, no member bank of the Federal Reserve System shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury with the approval of the President."⁷⁴

Under this authority the President may in a large measure control the banks, and may during an unfavorable economic period prevent them from transacting business except under such conditions and limitations as he shall prescribe.

The monetary powers of the President are equally great. In addition to the authority which he has over the banking system, he was given power in the Gold Reserve Act of 1934 to devalue the dollar to a minimum of fifty cents. The President also possesses great powers through the control of the stabilization fund, which is under the jurisdiction of the Secretary of the Treasury, through the power to issue greenbacks, and through controlling credit by the purchase and sale of government bonds by the Federal Reserve banks.⁷⁵

Water Power Projects. When in the opinion of the President the safety of the United States demands it, the President may take

⁷³ 50 USC App. (Trading with Enemy Act) 5, 5a.

⁷⁴ 12 USC 95.

⁷⁵ 31 USC 821, 822a. See Chap. 6, *supra*.

possession of any water power project "for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes."⁷⁶ The scope of the power defined in this statute is broad, and the authority of the President depends upon what he believes the safety of the United States requires in the event of war or other national emergency.

Generation and Transmission of Electric Energy. The President, acting through the Power Commission and exercising his authority over manufacturing industries, may virtually dictate how electric utilities shall operate. This commission may require the sale or exchange of electric energy to those demanding it, and may during an emergency control the generation and transmission of such energy as shall best serve the public interest. The authority of the Power Commission is thus defined. "During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority . . . to require by order such temporary connections of facilities and such generation, delivery, interchange or transmission of electric energy as its judgment will best meet the emergency and serve the public interest." No person is permitted to transmit any electric energy from the United States to a foreign country without first having secured an order from the commission authorizing it to do so.⁷⁷

Under this statute the Federal Power Commission is given such control of inter connection and co-ordination of facilities as is necessary to assure an abundant supply of electric energy throughout the United States. The power vested in the Commission is, therefore, of special importance, when considered in connection with the activity of the Federal Government in the development of public power projects.⁷⁸

⁷⁶ 16 USC 809, 807.

⁷⁷ 16 USC 824 (a).

⁷⁸ Northern Pennsylvania Power

Co. v. Pennsylvania Public Utility Commission, 132 Pa. Super. 178, 200 Atl. 866.

§ 144. **Other Emergency Powers.** Other emergency powers of the President are as follows: (a) To prohibit or restrict importation of articles from a country which restricts importation of United States products during any war in which the United States is not engaged;⁷⁹ (b) to refuse clearance to vessels of a belligerent country which discriminates against American vessels or citizens during the existence of any war in which the United States is not engaged;⁸⁰ (c) to compel any vessel to leave United States waters in case where by law or treaty it should not remain, and similarly to prevent any vessel belonging to a foreign nation from departing;⁸¹ (d) to detain any vessel whose principal cargo is arms and ammunition or other war supplies, when it appears likely to be used against nations at peace with the United States, until the owner shall furnish satisfactory proof that it does not intend to commit such hostile acts;⁸² (e) to withhold clearance from any vessel when there is cause to believe that it is about to carry fuel, arms or munitions of war to a warship of a belligerent nation in violation of United States laws or treaties;⁸³ (f) to remove duties from imported food, clothing and medical, surgical and other supplies for emergency relief work;⁸⁴ (g) to suspend the law prohibiting more than eight hours work in one day by persons engaged in government contracts, when military purposes require such suspension;⁸⁵ (h) to refuse transfer of vessels to foreign registry or ownership, to terminate charters of maritime commission vessels, and to authorize the maritime commission to requisition any American vessel;⁸⁶ (i) to regulate the anchorage and movement of vessels, foreign or domestic, in the territorial waters of the United States;⁸⁷ (j) to designate prohibited places under the espionage laws;⁸⁸ (k) and to order the national guard and the army and naval reserves to active duty.⁸⁹ Most of these emergency powers were written into laws enacted during the first World War in 1917-1918, and have remained largely inactive since that time. Some of them can be made effective only in war time, while others may be put into effect by executive order when war is imminent or when the President declares a national emergency. For ex-

⁷⁹ 15 USC 75-76.

⁸⁰ 15 USC 77.

⁸¹ 18 USC 27, 31-32.

⁸² 18 USC 29, 31.

⁸³ 18 USC 34.

⁸⁴ 19 USC 1313.

⁸⁵ 40 USC 326.

⁸⁶ 46 USC 808, 809, 835.

⁸⁷ 40 USC 191.

⁸⁸ 50 USC 36-37.

⁸⁹ 32 USC 81; 34 USC 757.

ample, the President declared a national emergency when the European war broke out in September, 1939.⁹⁰

§ 145. Veto Power. The President is vested with the power to approve or disapprove an Act of Congress. This power is popularly known as the "veto power," and is contained in the following provision of the Constitution:

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States. If he approves it, he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated."⁹¹

The section of the Constitution containing this provision makes it subject to two restrictions:

- (a) The power must be exercised within ten days. If the act is not vetoed or disapproved within such time, it becomes a law.
- (b) The veto may be overruled or overridden by a concurrent vote of both houses of Congress. By the term "two-thirds" is meant two-thirds of the members present.⁹²

The only duty required of the President by the Constitution is that he approve or disapprove a bill presented to him. If he approves it, he must sign it and need do nothing more. He need not write on the bill the word "approved" nor the date. If he does not approve it, he must return it with his objections.⁹³

If Congress adjourns sine die during the ten-day period, the President still may approve or disapprove the bill within the constitutional period.⁹⁴ If Congress adjourns sine die during the period and the President holds the bill beyond the period without either approving or disapproving it, the bill fails to become a law. This is what is known as the Pocket Veto.⁹⁵

The Supreme Court has held that where Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission, the

⁹⁰ See notes 79-89, *supra*, this section.

⁹¹ Const. Art. I, § 7, cl. 2.

⁹² *Missouri v. Kansas*, 248 U. S. 276, 63 L. ed. 239.

⁹³ *Gardner v. Barney*, 6 Wall. 499, 18 L. ed. 890.

⁹⁴ *LaAbra Silver Min. Co. v. United States*, 175 U. S. 168, 44 L. ed. 223; *Edward v. United States*, 286 U. S. 482, 76 L. ed. 1239.

⁹⁵ *Okanogan Indians v. United States (Pocket Veto Case)*, 279

bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of the House within the prescribed ten days and Congress does not pass the bill over his objections by the requisite votes.⁹⁶

These interpretations of the veto power have two fundamental purposes: (a) That the President shall have suitable opportunity to consider the bills presented to him, and (b) that Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.⁹⁷

§ 146. Proclamations. The power to issue proclamations is not specifically granted in the Constitution. It is contained in the general provision that the President "shall take care that the laws be faithfully executed."⁹⁸ Although a proclamation may be quasi-legislative in character, it is generally issued as an executive or administrative function.

The term proclamation as used here means a notice by an executive or administrative officer, as the President, or the secretary of one of the major departments, with reference to some matter of public policy or the exercise of some executive or administrative power affecting the public at large.⁹⁹ Examples of proclamations of great economic or political significance are such as (a) Proclamation prescribing the period of emergency during which banks which are members of the Federal Reserve system shall not transact any business except in accordance with the regulations, limitations, and restrictions prescribed by the Secretary of the Treasury;¹⁰⁰ (b) proclamation fixing the weight of the gold dollar;¹⁰¹ and (c) proclamations modifying schedules and tariffs under trade agreements with foreign countries.¹⁰²

In recent years the practice of issuing proclamations has been used frequently to announce the policies of the government in both international and domestic affairs, and to carry out the will of Congress. Upon the opening of the war between Germany and France, Poland, and the United Kingdom, India, Australia, and

U. S. 655, 73 L. ed. 527, 64 A. L. R. 1434, 1446 (adjournment and disapproval of bills).

⁹⁶ Wright v. United States, 302 U. S. 583, 82 L. ed. 439.

⁹⁷ Wright v. United States, 302 U. S. 583, 82 L. ed. 439; Edwards v. United States, 286 U. S. 482, 76

L. ed. 1239.

⁹⁸ Const. Art. II, § 3.

⁹⁹ 2 Bouv. Law Dict. (8th Ed.) 2732.

¹⁰⁰ 12 USC 95.

¹⁰¹ 31 USC 821.

¹⁰² 19 USC 1351-1352.

New Zealand, in 1939, President Roosevelt issued a proclamation of neutrality. Under a joint resolution approved by Congress May 1, 1937, he proclaimed an embargo on certain implements and materials considered as arms, ammunition and implements of war. On September 5, 1939, he proclaimed the existence of a limited emergency due to the second World War. Under a joint resolution of Congress approved November 4, 1939, he defined through proclamation great sections of European waters as combat areas, and forbade any citizen of the United States or any American vessel from proceeding into or through such areas, except under such rules and regulations as he prescribed.¹⁰³

The procedure is for Congress to pass an act that will go into effect upon the happening of a contingent event, which shall be declared by the President by Proclamation to have happened, or, upon the happening of a certain event, the President is empowered to apply the law; to further define its provisions; or to declare the policy or propound the limitations and restrictions to be followed by the United States and its citizens. When the proclamation is made under authority granted by Congress, it has the force of law.¹⁰⁴

The Supreme Court has held that the public proclamation of pardon and amnesty made by the President on December 25, 1868, to those who had participated in the Civil War had the force of public law of which all courts were bound to take notice whether specially called to their attention or not.¹⁰⁵ In fact, courts are generally required to take judicial notice of official proclamations and messages of the President, as well as the governors of the several states.¹⁰⁶

The President issues many proclamations which do not have the force of law, but which are largely directory or advisory. He annually appoints a day for Thanksgiving. He has appointed a day to be known as Child's Health Day; one to be known as "I am an American" Day; one to be known as National Maritime Day; and he has set apart a week to be known as National Employment Week. At the conclusion of World War II he appointed August 19,

¹⁰³ Proclamation June 21, 1943, No. 2588; United States Code Congressional Service (1939) pages 1510-1518, (1940) page 187; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255 (265).

¹⁰⁴ 2 Bouvier Law Dict. (8th Ed.) 2732.

¹⁰⁵ *Jenkins v. Collard*, 145 U. S. 546, 36 L. ed. 812.

¹⁰⁶ *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847.

1945 as a day of prayer. In many other instances he has given his approval, as well as publicity, to worthy causes of a patriotic, political, economic or social nature.¹⁰⁷

Proclamations, as well as executive orders, are printed as notice to the public in the Federal Register, an official publication of the government by an agency known as The National Archives, and, in order that they may be made available more widely to Congress, to the courts, and to the public, they are published also in the United States Code Congressional Service.

§ 147. Executive Orders. An executive order may be distinguished from a proclamation in that it is essentially legislative in character and is issued by reason of authority granted to the Chief Executive or other officer by Congress, or by reason of the authority vested in the President by the Constitution. Each order usually contains the following words: "By virtue of the authority vested in me by the Constitution and statutes of the United States," or simply, "By virtue of the authority vested in me by the act of Congress of" (stating the date).

These orders generally are limited to the conduct of government business, both civil and military.¹⁰⁸ They relate to such matters as the organization or re-organization of a government department;¹⁰⁹ to approving codes of Fair Competition under the National Labor Relations Act;¹¹⁰ to defining administrative procedure;¹¹¹ to fixing the status of property of a foreign nation located in this country;¹¹² to defining the duties of the Secretary of the Interior relative to the distribution of electric energy from government owned projects;¹¹³ to the suspension of the eight-hour law for laborers employed on government projects; and to provide for the unifying of foreign economic affairs.¹¹⁴ Executive orders supple-

¹⁰⁷ United States Code Congressional Service (1943), Pamphlet No. 1 and (1945) Advance Sheet No. 5.

¹⁰⁸ See Executive Order No. 8454 relating to regulations governing the allowance of travel expenses of claimants and beneficiaries of the Veterans' Administration.

¹⁰⁹ 5 USC 133s. See Reorganization Plan No. 1, effective July 1, 1939; Reorganization Plan No. 2, effective July 1, 1939.

¹¹⁰ 29 USC 151 et seq.

¹¹¹ See Order No. 8445 relating to appeals from decisions of the Auditor General of the Philippines to the President of the United States.

¹¹² See Orders No. 8389 and No. 8446, relating to the property of France or any national thereof.

¹¹³ See Executive Order No. 9366.

¹¹⁴ See Executive Order No. 9360.

ment Acts of Congress, or may be used to define rules of conduct and procedure in the administration of governmental affairs in fields not entirely regulated by congressional enactments, and the courts will construe these orders as they do legislation in the same field.¹¹⁵

Congress may provide that orders issued under a specific act must show the existence of certain facts or circumstances. General constitutional principles require that orders issued under such a law are void unless each order contains a statement or finding showing the existence of such facts. Speaking of these principles, Justice Hughes observed, "We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority, as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation."¹¹⁶

Legislation through executive orders has increased greatly in recent years, and now rivals in volume that enacted by Congress.¹¹⁷

¹¹⁵ *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243.

¹¹⁶ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446.

¹¹⁷ For example: The 77th Con-

gress in two years enacted 776 public laws, exclusive of pension bills, and President Roosevelt during the same two years issued 890 executive orders.

CHAPTER 14

FEDERAL COURTS

Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled.

—Woodrow Wilson

§ 148. Constitutional Provision. The Constitution provides for a system of courts of the United States as follows:

“The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.”¹

“The Congress shall have power to constitute tribunals inferior to the Supreme Court.”²

These provisions required Congress to create inferior courts, and to invest in them all that jurisdiction which, under Article III. of the Constitution, was exclusively vested in the United States.³ These provisions, however, do not express the full authority of Congress. Other provisions vested it with power to create additional courts and to clothe them with functions which it deemed essential or helpful in carrying its powers into execution.⁴

§ 149. The Supreme Court. The Supreme Court is the only court created by the Constitution and, in accordance with the requirement of Section 1 of Article III., Congress provided for its establishment in the Judiciary Act of 1789. Speaking of the establishment and authority of the Court at the centennial celebration of the founding of our present government, Hampton L. Carson wrote: “The establishment of the Supreme Court was the crowning marvel of the wonders wrought by the statesmanship of America. In truth the creation of the Supreme Court with its appellate powers was the greatest conception of the Constitution. It em-

¹ Const. Art. III, § 1.

⁴ Ex parte Bakelite Corp., 279

² Const. Art. I, § 8, cl. 9.

U. S. 438, 73 L. ed. 789.

³ Martin v. Hunter, 1 Wheat. 304,

⁴ L. ed. 97.

bodied the loftiest ideas of moral and legal power. . . . No product of government, either here or elsewhere, has ever approached it in grandeur. Within its appropriate sphere it is absolute in authority. From its mandates there is no appeal. Its decree is law. In dignity and moral influence it outranks all other judicial tribunals. No court of either ancient or modern times was ever invested with such high prerogatives."⁵

This exalted position has been due to many causes, among which the following are the most important: (a) The court is the highest tribunal in the judicial department of our government.⁶ (b) It has the power to declare any Act of Congress or of a state legislature unconstitutional. In this respect its power exceeds that of the Privy Council, which does not have a similar power under the English Constitution. In a dictatorship this power, in the final analysis, is held by the dictator.⁷ (c) It has the power to require the officers of the legislative and executive department to perform acts and duties which may be classed as purely ministerial.⁸ (d) Justices are appointed by the President with the advice and consent of the Senate. This means that every appointee is subjected to the greatest publicity. The appointee's personal history and his record as a lawyer and a public man are subjected to the severest scrutiny.⁹ (e) Once confirmed, the justices hold "office during good behavior" and receive for their services "a compensation which shall not be diminished during their continuance in office."¹⁰ (f) The justices upon appointment have merged their identity into that of the bench of the Supreme Court. As a rule they have submergerd their political and social affiliations.¹¹ (g) The justices as a rule have been distinguished lawyers, jurists and statesmen. Speaking of the Court, an historian remarked: "The title of the Supreme Court to public veneration and esteem does not rest alone on the peculiar character of its jurisdiction, or its powers, or the

⁵ Carson, *The Supreme Court of the United States*, 6-7. See also *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440.

⁶ Const. Art. III, § 1.

⁷ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; Loewenstein, *Hitler's Germany (The Nazi Background of War)*, Chap. 3.

⁸ *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60.

⁹ Const. Art. II, § 2, cl. 2.

¹⁰ Const. Art. III, § 1; Hughes, *Supreme Court of the United States*, 15.

¹¹ See 1 Warren, *Supreme Court in United States History*, 21-22; Hughes, *The Supreme Court of the United States*, 45.

wisdom with which they have been exercised, but largely upon the reputation of its judges for purity and ability."¹²

The legal-sovereignty of the nation is vested in this tribunal and in it alone. In a qualified sense it has been described as a continuous constitutional convention.¹³ "The vital point is," said a recent writer, "that the court has sensed the spirit of the age in which it has moved and has been thus attuned, in the vast majority of its decisions, to the dominant social mind rather than being in conflict with it. Instead of embalming the formal Constitution, it has made it a living thing, the sine qua non of a vehicle of life. The almost 300 volumes of judicial reports are not 'commentaries' on the Constitution; they are the real Constitution itself."¹⁴

Although the Supreme Court has been subjected to severe criticism during several periods of its history, it nevertheless shares largely with Congress and the Presidency in our national history. Charles Warren has written a classic work entitled "The Supreme Court in United States History," which begins: "The history of the United States has been written not merely in the halls of Congress, in the executive offices and on the battle fields, but to a great extent in the chambers of the Supreme Court of the United States. In the largest proportion of causes submitted to its judgment, every decision becomes a page of history."¹⁵

¹² Carson, *The Supreme Court of the United States*, 15. See also 1 Warren, *Supreme Court in United States History*, 23.

¹³ Beck, *The Constitution of the United States*, 221 ("Thus the Supreme Court is not only a court of justice, but in a qualified sense a continuous constitutional convention. It continues the work of the Convention of 1787 by adapting through interpretation the great charter of government, and thus its duties become political, in the highest sense of the word, as well as judicial"); Jackson, *The Struggle for Judicial Supremacy* XI ("It sat almost as a continuous constitutional convention, which without submitting its proposals to any ratification or rejection could amend

the basic law. . . . It speaks only through the technical forms of lawsuits. . . . Yet these lawsuits are the chief instrument of power in our system"); *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, 639, 39 L. ed. 759, 839 (dissenting opinion of Justice Harlan: "The construction seems to me to be a judicial amendment of the Constitution").

¹⁴ Albertsworth, *The Federal Supreme Court and the Superstructure of the Constitution*, 16 *Am. Bar. Ass'n Jour.* 565.

¹⁵ For criticism by Jefferson and others see 1 Warren, *The Supreme Court in United States History*, Chap. 17 (*Judiciary Reform 1821-1826*). For criticism during pre-Civil War and Civil War periods see

§ 150. Constitutional Courts. The Supreme Court of the United States and the inferior courts, established under the specific power granted in Section 2 of Article III. of the Constitution, are known as constitutional courts. These courts, other than the United States Supreme Court, are inferior only in the technical sense that they are special and limited in authority. The inferior constitutional courts are Circuit Courts of Appeal and United States District Courts. On April 12, 1933 the Supreme Court announced that the Supreme Court of the District of Columbia, now known as the United States District Court, and the United States Court of Appeals for the District of Columbia were also constitutional courts.

The jurisdiction of constitutional courts depends exclusively upon the powers defined in Section 2 of Article III. and the laws of the United States passed in pursuance of the power therein granted. Congress can invest these courts with no other or greater jurisdiction. In every case the presumption is that a court is without jurisdiction unless the contrary affirmatively appears of record.

§ 151. Legislative Courts. Courts created by Congress in the exertion of powers other than those granted in Article III. of the Constitution are known as legislative courts. The legislative courts are as follows: Territorial courts; the United States Court for China and consular courts; all of the courts of the District of Columbia except the Supreme Court of the District of Columbia,

2 Warren, Supreme Court in United States History, Chaps. 26-29. For criticism during period 1933-1940 see address of President Franklin D. Roosevelt dated March 9, 1937 ("The Court," he said, "in addition to the proper use of its judicial functions has improperly set itself up as a third House of Congress—a super-legislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there. We have, therefore, reached the point as a Na-

tion where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. I want . . . an independent judiciary as proposed by the Constitution"). See also Jackson, *The Struggle for Judicial Supremacy* (1941). See also Warren, *The Supreme Court in United States History*, 1.

now the United States District Court, and the United States Circuit Court of Appeals for the District. Special tribunals discussed in the following section also belong to this classification.

These courts were created by virtue of the general right of sovereignty which exists in the government, or by virtue of the clause of the Constitution, which enables Congress to make all needful rules and regulations respecting territory belonging to the United States. The courts of the District of Columbia were created by virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of government of the United States.¹⁶

The jurisdiction of legislative courts is such as is conferred by Congress, in execution of the general and the inherent powers which that body possesses. Their functions always are directed to the execution of one or more of such powers as are prescribed by Congress. They may be clothed with the authority of giving advisory decisions in proceedings which are not controversies under Article III. but are merely in aid of legislative and executive action, and therefore outside of the admissible jurisdiction of the constitutional courts.¹⁷

Judges of legislative courts are not subject to removal by the President.¹⁸

§ 152. Special Tribunals. Legislative courts have been created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, or it may delegate such power to executive officers, or it may commit it to judicial tribunals.

The most conspicuous example of these special tribunals is the Court of Claims. It was created and has been maintained as a legislative tribunal to examine and determine claims against the United States. This is a function which belongs primarily to Congress as an incident to paying the debts of the United States. But

¹⁶ See *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. ed. 242; *Williams v. United States*, 289 U. S. 553, 77 L. ed. 1372.

¹⁷ *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789.

¹⁸ *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789.

the function is one which Congress has the discretion either to exercise directly or to delegate to other agencies.¹⁹

The Court of Customs and Patent Appeals belongs to this class. This court exercises exclusive appellate jurisdiction over the final decisions of the United States Customs Court. On appeals from the patent office, its functions are administrative only.²⁰

Other examples were the late Court of Private Land Claims created by Congress to fulfill treaty stipulations over Spanish and Mexican land grants; the Choctaw and Chickasaw citizenship courts created to hear and determine controverted claims to membership in these two Indian tribes; and the United States Emergency Court of Appeals established under the Emergency Price Control Act of 1942.²¹

The distinguishing features of these special tribunals are: (a) no court can have cognizance of the claims, except as Congress shall make specific provision therefor; (b) no claimant has any right to sue on his claim unless Congress consents; (c) Congress may attach to its consent such conditions as it deems proper, even to requiring that suits be brought in a legislative tribunal, specially created to consider them.²²

§ 153. Provisional Courts. The President has power, by reason of his military authority, to establish provisional courts for the administration of civil as well as criminal justice in territory conquered and occupied by the armed forces of the United States. These courts include both trial and appellate courts. Provisional courts were established during the Mexican War, during the Civil War²³ and during World War II.

§ 154. Federal Judicial System. The Federal judicial system consists of Constitutional courts, legislative courts, special tribunals and administrative boards, commissions and officers. Administrative boards, commissions and officers are not properly classified as

¹⁹ *Williams v. United States*, 289 U. S. 553, 77 L. ed. 1372; *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789. See also 28 USC 301.

²⁰ *In re Hamilton*, 38 F. (2d) 889, 17 C. C. P. A. (Patents) 914.

²¹ 50 USC App. 924; *Lockerty v. Phillips*, 319 U. S. 182, 87 L. ed. 1339.

²² See note 20, *supra*; *Lockerty v. Phillips*, 319 U. S. 182, 87 L. ed. 1339.

²³ *Mechanics' & Traders' Bank v. Union Bank*, 22 Wall. 276, 22 L. ed. 871; *Re Vidal*, 179 U. S. 126, 45 L. ed. 118; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.

courts, but they are included as a part of the Federal judicial system because they exercise quasi-judicial powers. In order to present a complete picture of this system, the various courts and principal commissions are being classified and enumerated.

(a) *Constitutional Courts*: Supreme Court of the United States; Circuit Courts of Appeal; United States Court of Appeals for District of Columbia; District Courts of the United States; Supreme Court, now the United States District Court for the District of Columbia.²⁴

(b) *Legislative Courts*: District Court of Alaska; District Court of Hawaii; Supreme Court of Hawaii; Supreme Court of Philippine Islands; District Court of Puerto Rico; Supreme Court of Puerto Rico; District Court of Canal Zone; Magistrates Courts of Canal Zone; United States Courts for China; Consular Courts for China; District Courts of Virgin Islands; Inferior Courts of Virgin Islands; Municipal Court of the District of Columbia; Juvenile Court, District of Columbia; Municipal Court of Appeals for the District of Columbia; Commissioners Court, District of Columbia.²⁵

(c) *Special Tribunals*: Court of Claims; Court of Customs and Patent Appeals; Customs Courts; Patent Office.²⁶

(d) *Administrative Agencies With Quasi-Judicial Powers*: Interstate Commerce Commission; Federal Trade Commission; Tariff Commission; Commission under Grain Futures Act; Commissioner of Internal Revenue; National Labor Relations Board; Securities and Exchange Commission; Federal Power Commission; Federal Communications Commission; Secretary of Interior, Bituminous Coal Division, under the Bituminous Coal Act; Secretary of Agriculture, (1) under Agricultural Adjustment Act, (2) under Packers and Stockyards Act; Civil Aeronautics Authority; Federal Security Agency (Food and Drug Administration); and the Tax Court of the United States.²⁷

²⁴ Const. Art. III, § 2; 28 USC 301; 28 USC 211. See District of Columbia Code; O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1372; 28 USC 1.

²⁵ 48 USC 101, 191-192, 631, 861, 1071, 1342-1345, 1392. See also District of Columbia Code.

²⁶ 28 USC 241, 301; 19 USC 1518; 35 USC 1-6.

²⁷ 49 USC 11; 15 USC 21, 41, 45-46; 78d, 828-829 (see also Reorganization Plan No. 2); 19 USC 1330; 7 USC 8, 210, 608c (5b); 26 USC 1700; 29 USC 153; 16 USC 792; 47 USC 301, 303; 49 USC 425; 21 USC 371, 26 USC 600-605, 1100.

CHAPTER 15

FEDERAL JUDICIAL POWER, JUDICIARY

The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked.

—Chief Justice Stone

§ 155. **Definition.** Judicial power is the power of the courts to decide and to pronounce their judgments and to carry them into effect between persons and parties who bring cases before them for decision.¹ It involves not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal and property rights in controversy. The power to hear without the power also to adjudicate the rights of the parties to such proceedings is not the exercise of judicial power.²

It is the power which protects the rights and interests of individual citizens and to that end construes and applies the law.³ From a popular viewpoint it is the power which the public assumes is vested in the courts and in the judges.⁴

§ 156. **Source of Power.** The judicial power is one of the incidents of sovereignty of every state or nation.⁵ As a nation the United States possesses this power.⁶ It is defined by Article III. of the Constitution. Section 1 of this article recognized it by vesting it in the Supreme Court and such inferior courts as Congress

¹ *Muskrat v. United States*, 219 U. S. 346, 55 L. ed. 246; *Goetz v. Black*, 256 Mich. 564, 240 N. W. 94, 84 A. L. R. 802; *James River Nat. Bank v. Haas*, — N. D. —, 15 N. W. (2d) 442, 154 A. L. R. 1005.

² *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917 B 887.

³ *Illinois v. White*, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006.

⁴ *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.

⁵ *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

⁶ *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789.

should establish, and Section 2 limited the cases to which the power, as defined by this article, should extend.⁷ There is an additional power, however, which was exercised in the establishment of legislative courts. These courts were established by the powers of Congress, other than those granted in Article III. Exactly what the sources of the powers are, has not been defined, but similar powers have been referred to in other fields as "nonenumerated," "resulting," "general," and "aggregate" powers. They are in general the powers which are considered necessary and proper under Clause 18, of Section 8 of Article I.⁸

The development of the power has been an evolution of constitutional statutes and decisions. These statutes and decisions have been founded upon the powers exercised by the courts at law and in equity under the English and early American systems of jurisprudence. In fact, it has been stated by the authorities that "what constitutes judicial power, within the meaning of the Constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the Constitution."⁹

§ 157. Where Power Vested. Under Article III. of the Constitution, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. These courts constitute the Judicial Department.

Congress has no authority to vest these powers in the courts or the judicial officers of the several states.¹⁰ The powers cannot be conferred upon nonjudicial officers. They must be exercised by the judges in person.¹¹ They cannot delegate the power to any other officer or commission, and the legislature cannot delegate the power for them.¹²

⁷ Const. Art. III, §§ 1, 2, 3.

⁸ See generally *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287. See also *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956.

⁹ *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; *State v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

¹⁰ *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715.

¹¹ *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143; *Denver v. Lynch*, 92 Colo. 102, 18 P. (2d) 907, 86 A. L. R. 907.

¹² *Re Opinion of Justices*, 87 N. H. 492, 179 Atl. 344, 110 A. L. R. 819.

Judicial power is vested in the courts and not the judges. Judges exercise the power as officers of the courts only, and not in any sense as individuals. "The common law so vested it and the Constitution there continued it," observed Chief Justice Elliott of the Supreme Court of Indiana.¹³

§ 158. Scope of Power. The courts have held that Section 2 of Article III. is but a definite declaration that the judicial power of the United States shall extend to and include only the several matters particularly mentioned. This power is limited to controversies of a justiciable nature arising within the territorial limits of the United States.¹⁴

The following examples will illustrate the scope of the judicial power. Power to interpret the Constitution, to define the scope of the several departments of government, and to determine whether one of the departments has exceeded its functions; power to pass upon the constitutionality of the acts of the other departments; power to pass upon the constitutionality of statutes, but the courts have no general power to consider proposed and uncompleted legislation to determine whether an act will be valid or invalid if enacted into law; power to adjudicate questions arising over boundaries between the states; power over maritime law and admiralty jurisdiction; power to determine reasonableness of freight rates; power to grant injunctions, and to stay proceedings; to admit and disbar attorneys, and generally perform all other functions and duties required to interpret judicially and administer the law.¹⁵ It is equally well established that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.¹⁶

All Federal courts may also exercise such powers, though not strictly judicial in nature, which are incidental to the discharge of their judicial functions. These powers are necessary for the

¹³ *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.

¹⁴ *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956; *Burnett v. Greene*, 97 Fla. 1007, 122 So. 570, 69 A. L. R. 244; *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 72 Atl. 754, 17 Ann. Cas. 324; *Robertson v. Baldwin*, 165 U. S. 273, 41 L. ed. 715.

¹⁵ *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Bryndonjock v. State Bar*, 208 Cal. 439, 281 Pac. 1018, 66 A. L. R. 1507; *Spies v. Byers*, 287 Ill. 627, 122 N. E. 841.

¹⁶ *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, 86 L. ed. 363; *Burford v. Sun Oil Co.*, 319 U. S. 315, 87 L. ed. 1424.

proper functioning of the judicial department as a separate branch of the government. For example, Federal courts possess the inherent power to establish reasonable rules, not conflicting with express statutes for the transaction of their business. They may also appoint court commissioners as well as minor court officials.¹⁷

§ 159. Limitation of Jurisdiction. The jurisdiction of the Federal courts is limited to the powers granted by the Constitution and by law, and the Supreme Court has said that the two must co-operate, the Constitution as the fountain and the laws enacted by Congress as the streams which convey the jurisdiction to the courts.¹⁸ Jurisdiction cannot be conferred by stipulation or by consent of the parties. Without grant by Congress, the Federal courts have no common law jurisdiction.¹⁹ Congress cannot confer upon the Supreme Court original jurisdiction not granted by the Constitution.²⁰ A state law cannot confer jurisdiction on a Federal court, and it cannot burden the right of access to the court.²¹ The state courts may, however, furnish rules to ascertain the rights of the parties and thus assist in the administration of the proper remedies where the jurisdiction is already vested by the laws of the United States.²²

§ 160. Judicial—Nonjudicial Functions. The functions of constitutional courts are limited to judicial determinations. They are organized to determine legal rights of litigants, to enforce legal obligations only, and to redress injuries to legal rights. The courts are organized to administer impartial justice to contending parties, according to established procedure and the evidence produced at the trial. They are not permitted to balance the benefits and favors on each side of the controversy, but it is their duty to inquire into the rights of the parties as established by law, as found

¹⁷ *Re Hein*, 166 U. S. 432, 41 L. ed. 1066; *Denver v. Lynch*, 92 Colo. 102, 18 P. (2d) 907, 86 A. L. R. 907; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.

¹⁸ *Muskraat v. United States*, 219 U. S. 346, 55 L. ed. 246; *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *State ex rel. Truitt v. District Court*, 44 N. M. 16, 96 P. (2d) 710, 126 A. L. R. 651.

¹⁹ *United States v. Hudson*, 7 Cr. 32, 3 L. ed. 259; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155.

²⁰ *Muskraat v. United States*, 219 U. S. 346, 55 L. ed. 246.

²¹ *Ableman v. Booth*, 21 How 506, 16 L. ed. 169.

²² *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624.

in their contracts, as recognized in the established principles of equity and to decide accordingly. In other words, judicial power is limited to controversies, which are judiciable in nature.²³

These courts cannot exercise powers which are nonjudicial. In many cases, the courts have held that they have no power to exercise legislative, executive or administrative functions. The doctrine is equally well settled that Congress has no power to confer such functions upon these courts. It is likewise well settled that they are not vested with power to prevent breaches of ethical rules which violate no law.²⁴

The borderline between judicial and nonjudicial functions is difficult to define. The Supreme Court held that the decision of a district judge adjudicating a claim under the treaty of 1819 with Spain, although judiciable in nature, was a mere award and not a judicial proceeding.²⁵ An act empowering circuit courts to pass on pension claims with an appeal to the war department was held invalid because the power was nonjudicial.²⁶ The following functions have also been held to be nonjudicial: the determination of whether the establishment of an irrigation district would be in the interest of public health, convenience or welfare;²⁷ the appointment of trustees for a city water works system by a district court in advance of any litigation or dispute; the issue of an order to the sheriff to call an election when 50% of the voters petition the court to do so;²⁸ levy and assessment of taxes; and ratemaking.

²³ *Crump Co. v. Lindsay*, 130 Va. 144, 107 S. E. 679, 17 A. L. R. 747; *Orr v. Home Mutual Ins. Co.*, 12 La. Ann. 255, 68 Am. Dec. 770; *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261; *Asplund v. Haunett*, 31 N. M. 641, 249 P. 1074, 58 A. L. R. 573; *McManus v. Fulton*, 85 Mont. 170, 278 P. 126, 67 A. L. R. 690; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. ed. 143. See *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 74 L. ed. 969; *Heller v. Shapiro*, 208 Wis. 310, 242 N. W. 174, 87 A. L. R. 1201.

²⁴ *United States v. Todd*, 13 How.

52, 14 L. ed. 52; *Crump & Co. v. Lindsay*, 130 Va. 144, 107 S. E. 679, 17 A. L. R. 747; *In re Richardson*, 247 N. Y. 401, 160 N. E. 655 (Justice of Supreme Court of New York appointed by Governor to hear charges for him).

²⁵ *United States v. Ferrera*, 13 How. 40, 14 L. ed. 42.

²⁶ *Re Sanborn*, 148 U. S. 222, 37 L. ed. 429.

²⁷ *Burnett v. Greene*, 97 Fla. 1007, 122 So. 570, 69 A. L. R. 244.

²⁸ *State v. Barker*, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222; *Board of Supervisors v. Todd*, 97 Md. 247, 54 Atl. 963, 99 Am. St. Rep. 433.

The regulation of procedure, however, is a judicial power. The Supreme Court has held that Congress can delegate to the courts power to make regulations as to processes and proceedings, or to prescribe what property may be seized upon execution.²⁹

§ 161. Appeals from Nonjudicial Bodies. Appeals, when authorized by statute, may be taken from nonjudicial bodies to the courts. In enacting such statutes, however, the legislature cannot foist upon the courts nonjudicial functions, or authorize the courts to invade the powers of nonjudicial bodies. The appeals must be confined essentially to questions of law.

With the luxuriant growth of commissions in our Federal government this rule of law and jurisdiction is of the greatest importance. In order that these governmental agencies might function efficiently and legally, it was necessary to provide a right of appeal to the courts. An example of this effort was the Radio Act of 1927. The act provided for an appeal to the Circuit Court of Appeals of the District of Columbia, but in effect it made the court a superior revising agency only in the administrative field, and consequently its decision was not reviewable by the Supreme Court of the United States.

This Act of Congress came before the Supreme Court in 1930, and the court clearly defined its limited jurisdiction. It held that it was invested with judicial power only and that it had no jurisdiction other than the cases and controversies falling within the classes enumerated in Section 2 of Article III. of the Constitution. It held further that it had no power to give decisions which were merely advisory; nor could it exercise, or participate in the exercise of, functions which were essentially legislative or administrative.³⁰

On July 1, 1930 Congress amended the act. The amendment expressly limited the review to questions of law and provided that findings of fact by the commission, if supported by substantial evidence, should be conclusive unless it should clearly appear that the findings of the commission were arbitrary or capricious.

The Act of Congress as amended came before the Supreme Court in 1933, and the court held that the amended act, being in sharp contrast with the grant of authority of the original act, manifestly demanded judicial as distinguished from administrative review,

²⁹ *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209. *General Electric Co.*, 281 U. S. 464, 74 L. ed. 969.

³⁰ *Federal Radio Commission v.*

and it therefore assumed jurisdiction. To be judicial, it said, and so within the jurisdiction of the Supreme Court to review, it was not necessary that the proceeding should be entirely *de novo*. It might be in the form of an appeal from the decision of an administrative body.³¹

Appeals to state courts may also be taken from nonjudicial state bodies. These courts have held, however, that the rule, procedure, or practice cannot be extended to the point of empowering a court to control executive or administrative discretion.³²

§ 162. Political Questions. Political questions are not subject to judicial cognizance. Courts will leave the determination of such questions to the executive and legislative branches of the government. These branches are in charge of political affairs, and the propriety of what may be done in the exercise of their political power is not subject to judicial inquiry or decision.³³

The term "political" is used in its general sense. It means those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or which have been delegated to the full discretion of executive or legislative departments.

The following examples have been denominated political questions: The recognition of conflicting state governments;³⁴ the determination of an election contest for a state governor;³⁵ whether a state government has ceased to be republican;³⁶ questions relating to the protection and administration of property of Indian tribes; and questions pertaining to the foreign relations of the United States.³⁷ The questions, however, of whether an elected governor is a qualified citizen is a judicial question for the courts.³⁸

³¹ Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 77 L. ed. 1166. See also Keller v. Potomac Electric Power Co., 261 U. S. 428, 67 L. ed. 731.

³² State v. Tyler County Court, 112 W. Va. 406, 164 S. E. 515; In re Northwestern Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65.

³³ Luther v. Borden, 7 How. 1, 12 L. ed. 581; Coleman v. Miller, 307 U. S. 433, 83 L. ed. 1385, 122 A. L. R. 695; Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377.

³⁴ Luther v. Borden, 7 How. 1, 12 L. ed. 581.

³⁵ Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187.

³⁶ Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377.

³⁷ Oetjen v. Central Leather Co., 246 U. S. 297, 62 L. ed. 726; Ex parte Republic of Peru, 318 U. S. 578, 87 L. ed. 1014 (seizure and detention of property of a friendly sovereign).

³⁸ Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103.

§ 163. **Advisory Opinions.** The Supreme Court of the United States and other constitutional courts have no authority to give advisory opinions to either the legislative or executive departments. This power cannot be conferred upon these courts, either directly or by appeal. Their jurisdiction under the judiciary article of the Constitution is limited to cases and controversies. It does not extend to an issue of constitutional law framed by Congress or the President, or other officer for the purpose of invoking the advice of the court without real parties or a real case, or to administrative or legislative issues or controversies.³⁹

The question of advisory opinions to the chief executive was settled in the early days of Washington's administration by the refusal of the Supreme Court to reply to twenty-nine questions on matters of law submitted to the court by President Washington.⁴⁰

Legislative courts and special tribunals may give advisory opinions, when empowered by Congress to do so; and under the constitutions of several states, advisory opinions are legal. In most of the states, however, these opinions are looked upon with disfavor, or are held to be beyond the jurisdiction of the court.⁴¹

§ 164. **Declaratory Judgments.** Declaratory judgments may be rendered by the courts when statutes authorizing them have been enacted by the legislature. Section 274(d) of the Judicial Code, as amended August 30, 1935, provides for declaratory judgments in the Federal courts. The first paragraph of this section is as follows:

"In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." ⁴²

³⁹ Federal Radio Commission v. General Electric Co., 281 U. S. 464, 74 L. ed. 969; Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 89 L. ed. 1725; Asbury Hospital v. Cass County, — U. S. —, 90 L. ed. —.

⁴⁰ Muskrat v. United States, 219 U. S. 346, 55 L. ed. 246; Hughes,

Supreme Court of the United States, 30.

⁴¹ Ex parte Bakelite Corp., 279 U. S. 438, 73 L. ed. 789; Re Opinion of Justices, 87 N. H. 492, 179 Atl. 344, 110 A. L. R. 819; White v. Miller, 159 Miss. 49, 132 So. 79.

⁴² 28 USC 400.

The act in its limitation to "cases of actual controversy" manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense, and this requirement is no less strict than in any other type of action. Courts will not decide abstract, hypothetical or contingent questions. The word "actual" is one of emphasis rather than of definition. The operation of the act is procedural only.⁴³

Speaking of the purpose of this provision Justice Lindley of the Circuit Court of Appeals explained, "The law created no new substantive rights or legal relationships, but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of parties. Though such relief was inherent in some situations previously, the statute extended the propriety of the procedure greatly, with the obvious intent to avoid delay and accrual of damages against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued." The exercise of jurisdiction under this act rests in the sound discretion of the court and may be resorted to only where the interests of justice will be advanced and an adequate and effective judgment may be rendered.⁴⁴

The Federal courts have held that the relief granted by a declaratory judgment is neither legal nor equitable, but is *sui generis*. It has the advantage of escaping technicalities associated with equitable and extraordinary remedies. They have also held that the law should be liberally construed so as to carry out its underlying purpose to expedite and simplify the ascertainment of uncertain rights.⁴⁵

⁴³ *Altwater v. Freeman*, 319 U. S. 359, 87 L. ed. 1450; *Coffman v. Breeze Corporations, Inc.* 323 U. S. 316, 89 L. ed. 264; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 89 L. ed. 1725; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 81 L. ed. 617, 108 A. L. R. 1000.

⁴⁴ *Davis v. American Foundry Equipment Co.*, 94 F. (2d) 441, 115 A. L. R. 1486; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 77 L. ed. 730, 87 A. L. R. 1191;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 81 L. ed. 617, 108 A. L. R. 1000; *Brillhart v. Excess Ins. Co. of America*, 316 U. S. 491, 86 L. ed. 1620; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 89 L. ed. 1725.

⁴⁵ *United States Fidelity & Guaranty Co. v. Koch*, 102 F. (2d) 288, 123 A. L. R. 279; *Ohio Casualty Ins. Co. v. Marr*, 98 F. (2d) 973; *Western Casualty & Surety Co. v. Beverforden*, 17 F. Supp. 928.

The majority of the states have also adopted statutes providing for declaratory judgments. These statutes are similar and to a very great degree uniform in character. In fact, the Conference of Commissioners of Uniform State Laws has drafted a uniform statute which has been adopted by most of the states.⁴⁶

A declaratory judgment under a state statute may present a case or controversy under Article III. of the Constitution, which may be appealed to the Supreme Court of the United States, the appellate jurisdiction of the court being concerned with the substance of the action rather than with its form.⁴⁷ The judicial power of the Federal courts, however, does not extend to the adjudication of a difference of opinion unless the right asserted by one party is threatened with invasion by another.⁴⁸

§ 165. Federal Judiciary. The judges of all Federal courts are appointed by the President with the advice and consent of the Senate, but their terms of office vary, depending upon whether the court has been established under the provisions of Article III. of the Constitution or under the legislative or other powers of Congress. The judges of all constitutional courts hold office during good behavior, while those of legislative courts hold office for such period as Congress shall have prescribed.⁴⁹

The compensation of judges is subject to the same distinction. The salaries of judges of constitutional courts cannot be diminished during their continuance in office, and under Section 260 of the Judicial Code judges retiring but remaining subject to call for judicial duty have been held to continue in office, and their salaries have been held not subject to diminution under this clause. Under Article III. Federal judges enjoyed immunity from taxation of their salaries until the enactment of the Revenue Law of 1932, which provided that judges should be taxed as every one else. In

⁴⁶ *Ame Finance Co. v. Huse*, 192 Wash. 96, 73 P. (2d) 341, 114 A. L. R. 1345; *Washington Beauty College v. Huse*, 195 Wash. 160, 80 P. (2d) 403; *Heller v. Shapiro*, 208 Wis. 310, 242 N. W. 174, 87 A. L. R. 1201; *Washington Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618, 68 A. L. R. 105; *Petition of Kariher*, 284 Pa. 435, 131 Atl. 265.

⁴⁷ *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 77 L. ed. 730.

⁴⁸ *United States v. West Virginia*, 295 U. S. 463, 79 L. ed. 1546.

⁴⁹ Const. Art. III, § 1; *Ex parte Bakelite Corp.*, 297 U. S. 438, 73 L. ed. 789.

holding this law constitutional, Justice Frankfurter asserted "To subject them (Federal Judges) to a general tax is merely to recognize that judges are citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."⁵⁰ The salaries of judges of legislative courts are not restricted by this provision of the Constitution and are subject to increase or diminution as Congress shall direct.⁵¹

Judicial power cannot be delegated to any person. The people have a right to the personal judgment of those who have been made judges, and this right cannot be surrendered. This requirement includes the right and duty of deciding, as well as the duty of writing opinions. The term "personal judgment" must not be confused with "personal opinion." The judge must decide cases according to the law and the facts, and not in accordance with his own opinion and ideas, and however disagreeable that duty may be and no matter how greatly his judgment may differ from that of other high functionaries, he is not at liberty to surrender or waive it.⁵²

§ 166. Independence of Judiciary. The judiciary is free from the remotest influence, direct or indirect, of either of the other departments or of the public. Speaking of the necessity of this independence Justice Van Devanter, quoting from Wilson's *Constitutional Government of the United States*, wrote: "It is necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government. Indeed . . . it may be said that the whole efficacy and reality of constitutional government resides in the courts. Our definition of liberty is that it is the best practicable adjustment between the powers of government and the privileges of the individual."⁵³

⁵⁰ *Booth v. United States*, 291 U. S. 339, 78 L. ed. 836; *O'Malley v. Woodrough*, 307 U. S. 277, 83 L. ed. 1289. For earlier rule see *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519.

⁵¹ *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789.

⁵² *United States v. Dickson*, 15 Pet. 162, 10 L. ed. 689; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.
⁵³ *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519.

The independence of the Federal judiciary has in fact been perfected to almost the highest degree that is humanly possible. Not only is there no coercion or influence by the other departments, but they receive little or no information or knowledge of the consideration of pending cases. As the Federal courts, particularly the Supreme Court, function today, neither the President nor Congress receive the least notice of a decision until it is rendered in open court. So great is the precaution that the written opinions of the Supreme Court are printed in segments by different printers.

The wisdom of this independence was eloquently expressed by Chief Justice Marshall in the Virginia State Convention in 1829-1830. "The judicial department," he said, "comes home in its effects to every man's fireside; it passes on his property, his life, his all. Is it not to the last degree important, that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."⁵⁴

§ 167. Respect for Judiciary. Federal judicial tribunals and judges, due to the dignity, fairness and impartiality with which all judicial proceedings are conducted, have deserved and have enjoyed the highest respect, and have received the greatest moral support from the bar and the public in the performance of their duties. This has given due weight and authority to them in the performance of their functions in the interest of orderly government. "Respect for courts and judicial officers in the performance of their judicial functions or in matters that are incident to administering right and justice," according to Justice Whitfield of the Supreme Court of Florida speaking of courts and judges generally, "naturally arises in the human mind from an appreciation of the delicacy and importance of the power exercised by courts and judges, and by the becoming manner in which the functions are performed by those intrusted with the power. . . . Experience teaches as a rule that the courts and judicial officers are respected and deferred to in approximate proportion to the

⁵⁴ O'Donoghue v. United States,
289 U. S. 516, 77 L. ed. 1356.

propriety of judicial conduct and the efficiency of the performance of judicial functions.”⁵⁵

§ 168. Protection Against Bias of Judge. Litigants prosecuting or defending actions in the District Courts of the United States are protected from any bias or prejudice on the part of the judge made to appear through the filing of an affidavit. Section 21 of the Judicial Code provides, “Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit, before whom the action or proceeding is to be tried or heard, has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter.”⁵⁶

The purpose of this statute is to protect the litigant from the personal bias or prejudice of the judge, by reason of which he is unable to impartially exercise his functions in a particular case. It was not intended to enable a discontented litigant to oust a judge because of adverse rulings. Neither was it intended to paralyze the action of a judge who has heard a case, or a question in it by the interposition of a motion to disqualify him between a hearing and a final determination of the matter in issue.⁵⁷

⁵⁵ *Ex parte Earman*, 85 Fla. 297, 95 So. 755, 31 A. L. R. 1226. But see *Jackson, The Struggle for Judicial Supremacy XVIII*, citing *Fairman, Mr. Justice Miller and the Supreme Court 1862-1890*; *Frankfurter, Mr. Justice Holmes and the Supreme Court*, Cambridge Harv. Univ. Press 94.

⁵⁶ 28 USC 25; *Kinney v. Plym-*

outh Rock Squab Co., 201 Fed. 869; *Tjosevig v. United States*, 255 Fed. 5; *Fleming v. United States*, 279 Fed. 613; *Berger v. United States*, 25 U. S. 22, 65 L. ed. 481.

⁵⁷ *Ex parte Steel Barrel Co.*, 230 U. S. 35, 57 L. ed. 1379. See also *Cooke v. United States*, 267 U. S. 517, 69 L. ed. 767.

CHAPTER 16

JURISDICTION OF FEDERAL COURTS

The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.

—Chief Justice Stone

§ 169. Source of Authority. Every court of the United States derives its jurisdiction and judicial authority from the Constitution or laws of the United States.¹ Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. This body may give, withhold, or restrict such jurisdiction at its discretion. It may not, however, extend the jurisdiction of any court beyond the boundaries fixed by the Constitution.²

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in appellate form. In every other case the power is exercised in its original or appellate form, as the wisdom of Congress may direct. Except in the case of original jurisdiction of the Supreme Court, there are no cases under the Federal judicial power, from which the original jurisdiction of the inferior courts is excluded by the Constitution.³ Congress may, therefore, give

¹ *Jecker v. Montgomery*, 13 How. 515, 14 L. ed. 240.

² *Kline v. Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 226, 24 A. L. R. 1077; *Lockerty v. Phillips*, 319 U. S. 182, 87 L. ed. 1339.

³ *Osborn v. United States Bank*,

9 Wheat. 820, 6 L. ed. 204; *Home Life Ins. Co. v. Dunn*, 19 Wall. 226, 22 L. ed. 68. See also *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. ed. 104; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 81 L. ed. 617, 108 A. L. R. 1000.

to inferior courts such jurisdiction, original or appellate, within the limits of the Constitution as it may see fit to confer. It may go further. It may extend jurisdiction to any state court, where a case is presented which, by reason of the character of the parties or the question involved, falls within the scope of such judicial cognizance. This power, however, does not go so far as to define or limit the powers of state courts.⁴

§ 170. Extent of Judicial Power. The Constitution has defined the extent of the judicial power of the courts of the United States in the following section:

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”⁵

In this section the cases in which the Federal constitutional courts shall have jurisdiction have been specifically enumerated, and they are not authorized to take cognizance of any case that does not come within the powers therein specified.⁶ The several powers defined in this clause will be discussed in separate sections under descriptive topic headings.

§ 171. All Cases in Law or Equity. This provision includes all cases in law or equity under the Constitution or laws of the United States, and treaties made under their authority. It includes all criminal cases, and all civil cases.⁷

Every suit must substantially involve a dispute or controversy to be presented in court for its action. There must be parties to the action, as well as an assertion of rights, or a wrong to be remedied.¹²

⁴ *Randolph v. Fricke*, 327 Mo. 130, 35 S. W. (2d) 912.

⁵ Const. Art. III, § 2, cl. 1.

⁶ *Dred Scott v. Sandford*, 19 How. 401, 15 L. ed. 691.

⁷ *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648.

¹² *Muskrat v. United States*, 219 U. S. 346, 55 L. ed. 246; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 179 U. S. 239, 44 L. ed. 1052.

Cases at law or in equity are subject to the same distinctions as existed under the English, colonial and early state laws, as the same have been modified and developed by our jurisprudence since that time.¹³ Until the adoption of the Rules of Civil Procedure under the Act of Congress of June 19, 1934, two forms of action existed in civil cases.¹⁴ These Rules of Civil Procedure have abolished the two forms of procedure and have provided that there shall be but one form of action to be known as a "civil action," and this one form includes all suits of a civil nature whether cognizable as cases at law or in equity.¹⁵ The Supreme Court has confirmed the power to adopt these rules.¹⁶

Cases arise under the Constitution and the laws and treaties of the United States not only when a party comes into court to demand something conferred upon him by the Constitution, laws or treaties but also whenever the correct decision of the case as to the rights or defense of either party depends upon the construction of one of these instruments. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection or defense of the party, in whole or in part, by whom they are asserted.¹⁷

Cases under this provision are cognizable by the Federal courts regardless of parties.¹⁸ The courts receive jurisdiction whenever any question respecting the Constitution, laws or treaties of the United States assumes such a form that the judicial power is capable of acting on it, as when the subject is submitted to the court by a party who asserts his rights in the form prescribed by law.¹⁹

§ 172. Cases Affecting Ambassadors, Other Public Ministers, and Consuls. The phrase "ambassadors and other public ministers" is descriptive of a class existing by the law of nations, and

¹³ *Gordon v. Washington*, 295 U. S. 30, 79 L. ed. 1282; *Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994.

¹⁴ *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859.

¹⁵ Rules 1 and 2 of Rules of Civil Procedure for the District Courts of the United States.

¹⁶ *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. ed. 479.

¹⁷ *Tennessee v. Davis*, 100 U. S. 264, 25 L. ed. 648.

¹⁸ *Cohen v. Virginia*, 6 Wheat. 383, 5 L. ed. 225.

¹⁹ *Osborn v. United States Bank*, 9 Wheat. 819, 6 L. ed. 204; *Re Summers*, 325 U. S. 561, 89 L. ed. 1795.

includes both diplomatic representatives accredited by the United States to foreign nations and those credited by foreign nations to the United States. The term "public ministers" includes ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, charges d'affaires, agents, and secretaries of legation.²⁰

The following rules may be said to be established by the Constitution, statutes and decisions with respect to these officers: (a) No civil suit or criminal prosecution can be commenced against a foreign ambassador, or other public minister or consul in any state court, but one of these officers may commence a suit in a state court; (b) an ambassador or other public minister cannot be proceeded against in any civil action in either Federal or state courts; (c) a consul may be sued or proceeded against, civilly as well as criminally, in the courts of the United States. District courts have jurisdiction of such suits or prosecutions; (d) the Supreme Court has original and exclusive jurisdiction of suits and prosecutions against ambassadors and other public ministers; (e) the Supreme Court has original but not exclusive jurisdiction of suits brought by ambassadors, or other public ministers, or in which a consul is a party; (f) the Supreme Court has appellate jurisdiction in all cases affecting ambassadors, public ministers or consuls arising in the state or Federal courts and involving the construction of the Constitution, laws or treaties of the United States. But representatives of foreign governments, which are at war with the United States, cannot prosecute actions in our courts, although an enemy or an ally of an enemy may defend by counsel any suit which may be brought against him.²¹

Resident alien enemies, who are not classified as ambassadors, public ministers, or consuls are precluded from bringing suits in the courts of the country only so far as it is necessary to prevent the use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy.²²

§ 173. Admiralty and Maritime Jurisdiction. Jurisdiction in admiralty and maritime cases was exercised by courts of admiralty

²⁰ Ex parte Baiz, 135 U. S. 403, 34 L. ed. 222. 10); Ex parte Colonna, 314 U. S. 510, 86 L. ed. 379.

²¹ United States v. Ortega, 11 Wheat. 467, 6 L. ed. 521 (Notes 1-²² Ex parte Kumezo Kawato, 317 U. S. 69, 87 L. ed. 58.

in the colonies, and in the states prior to the Constitution.²³ Under the Constitution the entire admiralty power was vested in the Federal courts, and the jurisdiction of these courts is not limited by the rules of the common law.²⁴

Jurisdiction in these cases has grown through congressional action and through judicial interpretation to keep pace with the needs and development of our water-born commerce. It has been extended to all public navigable lakes, rivers and waterways which are or may be used as highways of commerce between the states, or with foreign nations, or between different points of the same state.²⁵ Admiralty jurisdiction is entirely independent of the power of Congress to control commerce. Neither of these powers is dependent on the other.²⁶

The jurisdiction of the Federal courts is exclusive.²⁷ A state, however, may define its boundaries on the sea and the boundaries of its counties. It may have jurisdiction of offenses not punishable under acts of Congress.²⁸ A state statute may be enforced in a maritime court, but the admiralty or maritime jurisdiction of the Federal courts cannot be enlarged or restricted by the legislation of a state.²⁹

This jurisdiction includes maritime tolls; maritime contracts, such as bottomry bonds, contracts of affreightments, contracts for the conveyance of passengers, contracts of insurance, contracts relating to pilotage and wharfage, claims and liens of materialmen for repairs, and seamen's wages. It also includes torts and crimes.³⁰ Jurisdiction in matters of contract depends upon the

²³ *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *Glass v. The Betsey*, 3 Dall. 6, 1 L. ed. 485.

²⁴ *American Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *The Stephen Allen*, 22 Fed. Cas. No. 13,361.

²⁵ *Genessee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058; *The Robert W. Parsons*, 191 U. S. 26, 48 L. ed. 73.

²⁶ *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 32 L. ed. 1017; *Ryman Steamboat Line Co. v. Commonwealth of Kentucky*, 125 Ky. 253, 101 S. W. 403, 10 L. R. A. (N. S.) 1187.

²⁷ *Glass v. The Betsey*, 3 Dall. 6, 1

L. ed. 440; *New Jersey Steam Navigation Co. v. Merchant's Bank*, 6 How. 344, 12 L. ed. 465.

²⁸ *Manchester v. Massachusetts*, 139 U. S. 264, 35 L. ed. 159.

²⁹ *The J. E. Rumbell*, 148 U. S. 12, 37 L. ed. 345.

³⁰ *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *New Jersey Steam Navigation Co. v. Merchant's Bank*, 6 How. 378, 12 L. ed. 465; *People's Ferry Co. v. Beers*, 20 How. 401, 15 L. ed. 961; *Manro v. Almeida*, 10 Wheat. 493, 6 L. ed. 369; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L. R. A. (N. S.) 1157.

nature of the contract, but in the case of torts, it depends upon locality as to whether the wrong is committed on the high seas or within the ebb and flow of the tide.³¹

§ 174. Controversies to Which the United States Is a Party. The judicial power of the United States extends to all cases in which the United States shall be a party. But since the United States is a sovereign and independent nation it cannot be sued without its consent, either by a state or by a private suitor in any court of the nation or of a state. Such consent may be withdrawn at any time. "The power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations," declared Justice Douglas.³²

The immunity of the United States from suit does not exempt an agent of the government, either corporate or individual. Congress may endow a governmental corporation, agency, or instrumentality with the government's immunity from suit, but the mere creation of such corporation or instrumentality or the fact that it does the government's work does not confer such legal immunity. The corporation's powers and functions must include the "to-sue-and-be-sued" clause.³³

The United States, as plaintiff, may institute a suit or other proceedings against a state or against an individual in any proper court. Speaking of the United States suing a state, Justice Harlan remarked: "We cannot assume that the framers of the Constitution . . . intended to exempt a state altogether from suit by the general government. They could not have overlooked the pos-

³¹ *Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 16 L. ed. 433.

³² *Kansas v. United States*, 204 U. S. 331, 51 L. ed. 510; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 944; see 28 USC 901-904 (consent by Act of Congress); *Maricopa County v. Valley Nat. Bank*, 318 U. S. 357, 87 L. ed. 834; *Mine Safety Appliance Co. v. Forrester*, — U. S. —, 90 L. ed. — (where United States is an indispensable party, a suit

cannot be maintained against one of its officers without its consent).

³³ *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U. S. 549, 66 L. ed. 762; *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 83 L. ed. 784; *Federal Housing Administration v. Burr*, 309 U. S. 242, 84 L. ed. 724; *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575, 87 L. ed. 471 (immunity does not extend to an agent of the Federal government where the liability is based on the fault of the agent).

sibility that controversies, capable of judicial solution, might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law."³⁴ By proper court is meant one of the courts of the United States, or the courts of a state, or those of a foreign nation. When the United States sues a state, the Supreme Court of the United States has original jurisdiction.³⁵

§ 175. Controversies Between Two or More States. Before the adoption of the Constitution, there were many controversies between states, especially over boundary questions. These disputes caused the adoption of this provision. Under the Articles of Confederation, the United States was largely an arbiter. Under this provision, however, the United States is more than an arbiter. In any case that has been instituted judgment may be entered, and the United States has power to enforce the judgment of the court.³⁶

Controversies included under this provision are limited to those of a civil nature.³⁷ They have generally concerned boundaries and jurisdiction over lands and their inhabitants, or have been cases directly affecting the property rights and interests of a state. One state may, however, sue another state to recover the amount of a bond debt due the suing state, but a state may not maintain such an action if it is not the real party in interest. The courts of the United States have exclusive jurisdiction over these controversies.³⁸

In order to institute an action, the process is served upon the governor and the attorney general of the state. It is not good service if only one of these officers is served. It has become an established principle of law that no coercive measures will be taken against the state to make it appear in court. The plaintiff, however, will be permitted to appear in an *ex parte* manner and, when

³⁴ *United States v. Texas*, 143 U. S. 621, 36 L. ed. 285.

³⁵ *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336.

³⁶ *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838.

³⁷ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239.

³⁸ *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838; *Virginia v. West Virginia*, 206 U. S. 290, 51 L. ed. 1068; *South Dakota v. North Carolina*, 192 U. S. 236, 48 L. ed. 448; 28 USC 371; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656.

judgment is obtained, it will be enforced against the nonappearing state.³⁹

Ordinarily, a state cannot maintain a suit against another state for and on behalf of its citizens. If the health and comfort of the people, however, is threatened the state is the proper party.⁴⁰ For example, the construction by a public corporation, as an agency of the state, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another and adjacent state furnishes a sufficient basis for controversy between the states of which the Supreme Court has jurisdiction.⁴¹ A suit against the governor in his official capacity is a suit against the state.⁴²

§ 176. Controversies Between a State and Citizens of Another State. Under this clause a state may enter suit against citizens of another state or states, but since the adoption of the Eleventh Amendment, a state of the union cannot be sued by a citizen of another state, or by a citizen or subject of any foreign state. The reason for this amendment was historical. In the early history of our nation, many of the states were deeply in debt. The bonds were held by individuals and the states were fearful that they would be sued upon the bonds. In 1793 the Supreme Court held that a citizen could sue a state, and the Eleventh Amendment was adopted in 1798.⁴³ This Amendment is not violated by joining the judge of a state court as one of the defendants in a case.⁴⁴ A state may still be sued by another state or by the United States.⁴⁵

The object of this provision of Article III. of the Constitution was to enable controversies between states and citizens of other states to be determined by a national tribunal and thereby avoid partiality or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens.⁴⁶

³⁹ *New Jersey v. New York*, 5 Pet. 284, 8 L. ed. 127; *Huger v. South Carolina*, 3 Dall. 339, 1 L. ed. 627; *Grayson v. Virginia*, 3 Dall. 320, 1 L. ed. 619.

⁴⁰ *Massachusetts v. Rhode Island*, 12 Pet. 755, 9 L. ed. 272.

⁴¹ *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497.

⁴² *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717.

⁴³ *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; Amendment XI; *Georgia v. Tennessee Copper Co.* 206 U. S. 230, 51 L. ed. 1038.

⁴⁴ *Treinies v. Sunshine Min. Co.*, 308 U. S. 66, 84 L. ed. 1.

⁴⁵ *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336.

⁴⁶ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239.

The immunity enjoyed by a state under this provision is a personal privilege. "The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which may be waived at pleasure," wrote Justice Matthews, "so that in a suit, otherwise well brought in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction."⁴⁷

§ 177. Controversies Between Citizens of Different States. The object of this clause was to secure the citizen freedom from local prejudice, which might injure him if he were compelled to litigate his claim against another in the tribunals of a state not his own. In the early history of our country, and perhaps at the present time, there was a likelihood that a citizen of one state might be assisted by local influence in his favor when the action was brought by a citizen of another state.⁴⁸ The basic premise of this jurisdiction is that the Federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts.

The word "citizen" is used in its ordinary sense and means either a native born or a naturalized citizen. A resident of the District of Columbia or of the territory of Alaska is not a citizen of a state in the Federal court.⁴⁹ A corporation, by a legal fiction, is considered to be a citizen of the state in which it is incorporated, and the Supreme Court has held that a foreign corporation, having, upon admission to a state, designated a local agent for the service of process in any action in the state, thereby consented to being sued in a Federal court sitting in that state.⁵⁰ Citizenship cannot

⁴⁷ Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780.

⁴⁸ Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849; Massachusetts (also Frothingham) v. Mellon, 262 U. S. 447, 67 L. ed. 1078; Chisolm v. Georgia, 2 Dall. 419; Story, Constitution, 1638, 1682; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Terrall v. Burke Construction Co. 257 U. S. 529, 66 L. ed. 352 (corporation as citizen); Neirbo v. Bethlehem Shipbuilding Corp. 308 U. S. 165, 84 L. ed. 167

(foreign corporation may be sued in any state in which it has designated an agent for service of process).

⁴⁹ Hepburn v. Ellzey, 2 Cr. 445, 2 L. ed. 332.

⁵⁰ National Steamship Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87; Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. 309 U. S. 4, 84 L. ed. 537; Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. ed. 167, 128 A. L. R. 1437.

be predicated on a partnership. Its citizenship must depend upon the citizenship of its individual members, and the Federal court will not have jurisdiction if some of the partners are citizens of the same state as the adverse party, though the others are not.⁵¹ The citizenship of unincorporated associations, societies and companies must be determined by the citizenship of its members.⁵² The general rule of jurisdiction under this provision is that all of the parties on one side of the controversy should be citizens of a different state or states from the parties on the other side, but the court may rearrange the parties according to the facts and according as their interests really lie with one side or the other.⁵³

To bring a case within this provision, the diversity of citizenship must have existed when the suit was entered, and must have been positively averred. An averment of residence instead of citizenship is not sufficient.⁵⁴

§ 178. Controversies Between Citizens of the Same State Claiming Lands Under Grants of Different States, and Between a State, or Its Citizens, and Foreign States, Citizens, or Subjects. The jurisdiction of the Federal courts extends to a case where one of the parties is a foreign state or government, or one of its subjects or citizens, and the other is a state of the union or a citizen of one of the states.⁵⁵ It includes the Emperor of a foreign nation as well as its subjects.⁵⁶ If both parties are aliens, the Federal courts have no jurisdiction.⁵⁷ A corporation existing under the laws of a foreign country is deemed an alien within the meaning of this provision. Under it an alien remains such until he has been fully naturalized. His declaration of intention does not deprive him of his right to sue or be sued in the Federal courts.⁵⁸ An Indian nation within the United States is not considered a foreign state.⁵⁹

⁵¹ *Ersine Motors Co. v. Chevrolet Motor Co.*, 180 N. C. 619, 105 S. E. 420.

⁵² *Brown v. Protestant Episcopal Church*, 8 F. (2d) 149.

⁵³ *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514.

⁵⁴ *Abererombie v. Dupuis*, 1 Cr. 343, 2 L. ed. 129.

⁵⁵ Const. Art. III, § 2, cl. 1.

⁵⁶ *The Sapphire v. Napoleon III*, 11 Wall. 164, 20 L. ed. 127.

⁵⁷ *Montalet v. Murray*, 4 Cr. 46, 2 L. ed. 545.

⁵⁸ *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 464, 5 L. ed. 662.

⁵⁹ *Cherokee Nation v. Georgia*, 5 Pet. 16, 8 L. ed. 25.

When these parties exist the subject of the controversy is immaterial. In other words, these parties have the constitutional right to come into the courts of the United States, irrespective of the subject of the controversy.⁶⁰ No party, however, may sue the United States or, since the adoption of the Eleventh Amendment, a state without its consent. The states are also immune, except with their consent, from suits brought against them by their own citizens or by Federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment.⁶¹

The section of this provision relating to controversies between citizens of the same state claiming lands under grants of different states is now largely of historical importance. At the time of the adoption of the Constitution many citizens of one state held lands under grants of other states, and this provision was included in the Constitution so that they might have an independent forum in which to protect their interests.

§ 179. Limitations on Jurisdiction. Congress has placed certain limitations upon the jurisdiction exercised by the courts of the United States. Among these limitations are the following specific enactments:

(a) *Minimum Amount Involved.* Section 24 (1) of the Judicial Code provides:

"The district courts shall have original jurisdiction . . . of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00 and (a) arises under the Constitution and laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens and subjects."⁶²

Under this enactment the Federal courts are without jurisdiction if the amount involved is less than three thousand dollars,⁶³ and jurisdiction cannot be conferred upon the court through the agreement of the parties.⁶⁴ By the amount involved is meant the actual

⁶⁰ *Cohen v. Virginia*, 6 Wheat. Marshall, 23 F. (2d) 225; *Miller v. First Service Corp.* 84 F. (2d) 680, 109 A. L. R. 1179.

⁶¹ *Monaco v. Mississippi*, 292 U. S. 313, 78 L. ed. 1282.

⁶² 28 USC 41 (1).

⁶³ *New York Life Ins. Co. v.* 283, 82 L. ed. 845.

⁶⁴ *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 90 F. (2d) 229, rev'd on other grounds, 303 U. S.

matter in dispute, the value of the rights involved, or the pecuniary result to either party which the judgment would directly produce either at once or in the future.⁶⁵ The purpose of the statute is to prevent the docket of the courts from being overcrowded with small cases.⁶⁶

(b) *Assignment of a Chose in Action.* Section 24 (1) of the Judicial Code further provides:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."⁶⁷

The purpose of this enactment is to prevent the owner of a chose in action, who cannot sue on it in the United States courts because there is no diverse citizenship, from assigning it to a citizen of another state in order that the assignee may sue upon it in the Federal court.⁶⁸ There is excepted from this prohibition, however, foreign bills of exchange and obligations of corporations payable to bearer.⁶⁹ This section applies only to actions to recover upon the note or chose in action.⁷⁰

(c) *State Rate Orders.* The act of May 14, 1934 of the Judicial Code provides:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after

⁶⁵ *Enzor v. Jefferson Standard Life Ins. Co.*, 14 F. Supp. 677.

⁶⁶ *Davis v. Mills*, 99 Fed. 39.

⁶⁷ 28 USC 41 (1); 7 USC 194.

⁶⁸ *Davis v. Mills*, 99 Fed. 39; *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698.

⁶⁹ *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664.

⁷⁰ *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377.

reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."⁷¹

This means that litigation involving public utility rates, when the rates are made by state authority, must be conducted in its initial stages in the state courts only. There is, however, a right to appeal to the Supreme Court of the United States to review the final judgment, if there is a substantial Federal question involved.⁷²

(d) *State Taxes.* The act of August 21, 1937 of the Judicial Code provides:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."⁷³

This means that litigation involving state taxation must be confined to the state courts whenever they afford a plain, speedy and efficient remedy. There may be, however, an appeal to the Supreme Court of the United States in the proper case.⁷⁴

§ 180. Federal Jurisdiction Exclusive. In addition to the exclusive jurisdiction of the Federal courts in admiralty and maritime cases; of controversies of a civil nature where a state is a party; and of suits against ambassadors, or other public ministers, discussed in previous sections, Congress has made the jurisdiction of the courts of the United States exclusive of the courts of the several states in the following cases:

- (a) Of all crimes and offenses cognizable under the authority of the United States.
- (b) Of all suits for penalties and forfeitures incurred under the laws of the United States.
- (c) Of all seizures under the laws of the United States on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of

⁷¹ 28 USC 41 (1).

⁷² *East Ohio Gas Co. v. City of Cleveland*, 94 F. (2d) 443; *Mississippi Power & Light Co. v. City of Jackson*, 9 F. Supp. 564.

⁷³ 28 USC 41 (1).

⁷⁴ *Garron, MacLain & Garron v. Bass*, 88 F. (2d) 574; *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 80 L. ed. 220; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 87 L. ed. 1407.

all proceedings for the condemnation of property taken as a prize.

- (d) Of all cases arising under the patent-right, or the copyright laws of the United States.
- (e) Of all matters and proceedings in bankruptcy.

The authority of Congress to withhold all jurisdiction from state courts includes the power to restrict the occasions when that jurisdiction may be invoked.⁷⁵

§ 181. Removal of Suits, Comity. Section 20 of the Judicial Code provides:

“Any suit of a civil nature at law or in equity, arising under the Constitution, or laws of the United States, or treaties made or which shall be made under their authority, of which the district courts of the United States are given original jurisdiction in any state court, may be removed by the defendant, or defendants therein to the district court of the United States for the proper district.”

It also provides specifically for removal in the following cases:

(a) In any other suit in law or equity of which the District Court shall have jurisdiction by a nonresident defendant or defendants; (b) where the controversy is wholly between citizens of different states; (c) where the suit is between a citizen of the state in which the suit is brought and the citizen of another state, and there is an established local prejudice or influence.⁷⁶ This means that, if the action might have been brought originally in the District Court of the United States, it can be removed there. If the suit could not have been brought there, it cannot be removed there. The jurisdiction exercised on removal is original, not appellate.⁷⁷

The following cases cannot be removed: (a) Cases arising under Sections 54–59 of Title 45 of United States Code. These titles relate to the liability of common carriers by railroads in interstate or foreign commerce for injuries to employees; (b) cases against common carriers to recover damages for delay, loss of, or injury to property received for transportation where the value does not exceed \$3,000.00; (c) cases enumerated in subdivisions (a), (b),

⁷⁵ 28 USC 71; *Bowles v. Willingham*, 321 U. S. 503, 88 L. ed. 892.

⁷⁶ 28 USC 71.

⁷⁷ *Home Ins. Co. v. Morse*, 20

Wall. 445, 22 L. ed. 365; *Southern R. Co. v. Millis*, 217 U. S. 204, 54 L. ed. 732; *Freeman v. Bee Machine Co.* 319 U. S. 448, 87 L. ed. 1509.

(c) and (d) of Section 179, *supra*.⁷⁸ Neither can the District Court nor other court of the United States grant an injunction to stay proceedings in any state court, except in cases where such an injunction may be authorized by any law relating to bankruptcy, and except when, under certain conditions, it is necessary for the Federal court to have possession or control of property involved in the action in the state court in order to proceed with the cause and to grant the relief sought.⁷⁹

The procedure for removal is as follows: The party desiring to remove the case must file in the state court, at the time or before the defendant answers or pleads, a petition for the removal of the suit to the District Court. He must file with the petition a bond guaranteeing that a copy of the record will be prepared and filed in the District Court within 30 days and that he will pay all the costs if the District Court shall decide that the suit was improperly removed. If the state court accepts the petition and bond, it cannot proceed further. If the petition is denied by the state court, the petitioner may except to the ruling and litigate the case in the state court, or he may proceed in both the Federal and state courts at the same time. If the cause was one subject to removal, the proceedings in the state court after the filing of the petition would be invalid. Upon acceptance of the petition, the state court enters an order of removal, and the record is sent to the clerk of the District Court. The judge of the District Court then decides the question of jurisdiction. If the decision is in favor of jurisdiction, the case proceeds in the District Court. If the decision is unfavorable, the case is remanded to the state court.⁸⁰

A state cannot prohibit, restrict or place conditions upon the removal of a case instituted in a state court to the District Court of the United States.^{80a}

⁷⁸ 28 USC 71.

⁷⁹ 28 USC 379; *Tonecy v. New York Life Ins. Co.*, 314 U. S. 118, 86 L. ed. 100, 137 A. L. R. 967; *Southern R. Co. v. Painter*, 314 U. S. 155, 86 L. ed. 116; *Mandeville v. Canterbury*, 318 U. S. 47, 87 L. ed. 605.

⁸⁰ Rules of Civil Procedure 81 (c); 28 USC 71-83; *Yankaus v. Feltenstein*, 244 U. S. 127, 61 L.

ed. 1036; *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U. S. 563, 85 L. ed. 1044.

^{80a} *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 186 (holding unconstitutional a statute of Arkansas requiring a foreign corporation to waive the constitutional right to resort to the Federal courts).

There is a certain comity between Federal and state courts. In fact, when a proper petition and bond have been filed in the state court, and it appears on the face of the record that the case is removable, it is the duty of the court to order removal and to proceed no further in the suit.⁸¹ On the other hand, the Supreme Court of the United States has held that a prisoner while serving a sentence imposed by a District Court of the United States could be taken on a writ of habeas corpus into a state court and there put on trial upon indictments pending against him. Speaking of this comity, Chief Justice Taft remarked: "The United States may on its part practice the comity which the harmonious and effective operation of both systems of courts require, provided it does not prevent enforcement of the sentence of the Federal courts or endanger the prisoner."⁸² But without consent, no state court, after being judicially informed that a party is imprisoned under the authority of the United States, or is held under such authority by a Federal officer, has any right to interfere with such party or to require him to be brought before it through a writ of habeas corpus.⁸³ A state legislature may not make a Federal District Court into an appellate tribunal or otherwise expand its jurisdiction. A Federal District Court may refuse to exercise jurisdiction of a case involving the same issues as a case pending in a state court. "Ordinarily it would be uneconomical as well as vexatious for a Federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by Federal law, between the same parties," declared Justice Frankfurter. "Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."⁸⁴

§ 182. District Court. The District Court is the trial court. Civil practice there is conducted under the Rules of Practice and

⁸¹ *Dretsch v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. ed. 462.

⁸² *Ponzi v. Fessenden*, 258 U. S. 254, 66 L. ed. 607, 22 A. L. R. 879; *Harkin v. Brundage*, 276 U. S. 36, 72 L. ed. 457 (as between state and Federal courts with concurrent and co-ordinate jurisdiction the

first to obtain jurisdiction shall be entitled to hold it).

⁸³ *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Tarlie's case*, 13 Wall. 397, 20 L. ed. 597.

⁸⁴ *Burford v. Sun Oil Co.*, 319 U. S. 315, 87 L. ed. 1424; *Brillhart v. Excess Ins. Co. of America*, 316 U. S. 491, 86 L. ed. 1620.

Procedure which were adopted by the Supreme Court of the United States pursuant to an Act of Congress of June 19, 1934. These rules relate to the commencement of actions; service of process; pleadings and motions; parties; depositions and discovery; trials; judgment; provisional and final remedies; special proceedings; and appeals. The purpose of these rules is to secure the just, speedy and inexpensive determination of every action. They have introduced into Federal procedure the simplicity of the one form of action for both law and equity cases provided by the code procedure of western states, particularly the State of Washington. Criminal procedure is defined by the Criminal Code of the United States, and the Rules of Criminal Procedure.⁸⁵

Ordinarily there is but one trial judge in the District Court. In several classes of cases, however, Congress has provided that the District Court shall be held by three judges, of whom one must be a justice of the United States Supreme Court or one or more must be judges of a Circuit Court of Appeals. These cases include: (a) Any suit in equity in which the United States is complainant brought under the Anti-Trust Act of July 2, 1890, or the Interstate Commerce Act of February 7, 1887 and amendments to it, or any other act of like purpose, if, in the opinion of the attorney general, the case is one of general public importance; (b) Cases involving injunctions under four different acts, including an injunction against the enforcement of a state statute. The purpose of the three-judge court is to secure two results: (a) That the cases shall be heard promptly; and (b) that they shall be heard by greater authority than the ordinary district court held by one judge. Upon appeal from a decision of the three-judge court, the case goes directly to the Supreme Court of the United States. The cases involving the three-judge court are not numerous, but they are usually very important.⁸⁶

⁸⁵ Rules of Civil Procedure published by U. S. Government Printing Office; 18 USC Part 2. See also Federal Rules of Criminal Procedure promulgated by the Supreme Court, 1944; Mississippi Pub. Corp. v. Murphree, — U. S. —, 90 L. ed. — (Congress has authority to provide for the service of process anywhere in the United States).

⁸⁶ 28 USC 47; 15 USC 1-7, 15,

28-29; 49 USC 1 et seq.; (a) 28 USC 380, Judicial Code, § 266 (re injunction against enforcement or operation of state statute or commission acting under it); (b) 28 USC 47 (injunction suspending or setting aside order of Interstate Commerce Commission); (c) 7 USC 217, 316 (Packers and Stockyards Act restraining or suspending orders of Interstate Commerce Com-

The jurisdiction of the District Court extends to:

- (a) General jurisdiction over all crimes and offenses against the United States.⁸⁷
- (b) Original jurisdiction of civil actions. The controlling provisions defining this jurisdiction are contained in Section 24 of the Judicial Code. The most important of these provisions is as follows: "The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (1) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (2) is between citizens of different states, or (3) is between citizens of a state and foreign states, citizens or subjects."⁸⁸
- (c) Jurisdiction of suits and proceedings in bankruptcy.⁸⁹
- (d) Jurisdiction over all claims against the United States. This jurisdiction is concurrent with that of the Court of Claims for amounts not exceeding \$10,000. Jurisdiction also, of suits against the Collector of Internal Revenue to recover taxes.⁹⁰
- (e) Review of certain orders of the Interstate Commerce Commission relating to the enforcement or setting aside, annulling or suspending orders, and suits and mandamus proceedings to compel obedience to the Commerce Act, and also review orders of the Secretary of Agriculture under the Packers and Stockyards Act. Under the decisions of the Supreme Court this power of review, however, is practically limited to errors of law of the Commission. This means that the court will give relief only when the Commission has exceeded the power granted by Congress or

mission); (d) 28 USC 380a (restraining enforcement or operation of any act of Congress); see also *Phillips v. United States*, 312 U. S. 246, 85 L. ed. 801; *Liberty Nat. Life Ins. Co. v. Read*, 24 F. Supp. 105.

⁸⁷ 28 USC 41 (2), 371.

⁸⁸ 28 USC 41.

⁸⁹ 28 USC 41 (19).

⁹⁰ 28 USC 41 (20), 41 (5); *United States v. Bertelsen & Peterson Engineering Co.*, 306 U. S. 276, 83 L. ed. 647.

where a party has been deprived of some right or property guaranteed by law. Review of convictions by commissioners in national parks; and review of reparation orders under the Perishable Agricultural Commodities Act.⁹¹

- (f) Jurisdiction to prevent and restrain the violation of certain acts of Congress, and to compel or enjoin the enforcement of regulations adopted by administrative agencies such as the Federal Communications Commission. In considering the regulations of this Commission, the inquiry is limited to a review of the evidence before the Commission. The court may not try the matter *de novo*.⁹²

§ 183. Circuit Court of Appeals. (a) *Appellate Jurisdiction.* The Circuit Court of Appeals has appellate jurisdiction to review all final decisions of the district courts, save where a direct review of the decision may be had by the Supreme Court of the United States; to review all final decisions of the United States District Courts for Hawaii, for Puerto Rico, for Alaska, for the Virgin Islands, and of the United States Court for China; also to review final decisions in certain cases from District of the Canal Zone and the Supreme Courts of Hawaii and Puerto Rico. It also has power to review interlocutory orders or decrees of the district courts, including the district courts of Alaska, Hawaii, Virgin Islands and the Canal Zone. The procedure for taking appeals in civil cases from the district courts to the Circuit Court of Appeals is regulated by the Rules of Civil Procedure. In criminal cases appeals are governed by the Rules of Practice and Procedure in criminal cases promulgated by the Supreme Court. The writ of mandamus may be used in aid of appellate jurisdiction but it cannot be used as a substitute for the appellate procedure prescribed by statute.⁹³

⁹¹ 28 USC 27, 28, 41, 301-311; 7 USC 217; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 71 L. ed. 463; 16 USC 65; 7 USC 499g.

⁹² *National Broadcasting Co. v. United States*, 319 U. S. 190, 87 L. ed. 1344; 15 USC 4 (restrain violation of anti-trust laws); 9 USC 9 (confirmation of award of arbitrators in maritime transactions); 15 USC 49 (compliance with orders

of Federal Trade Commission); 15 USC 77t, 77u (compliance with the Securities Act and the Securities Exchange Act); 28 USC 41 (6) (suits under Postal laws); 45 USC 228k (enforcement of orders of Railroad Retirement Board); 42 USC 405 (g) (review of decision of board under Social Security Act).

⁹³ 28 USC 225; *Butterick v. Federal Trade Commission*, 4 F. (2d)

(b) *District of Columbia.* The Circuit Court of Appeals, known as the United States Circuit Court of Appeals, for the District of Columbia, has appellate jurisdiction over final judgments of the following courts, to-wit: United States District Court of the District of Columbia and the Municipal Court of Appeals of the District of Columbia. It also has jurisdiction of appeals from administrative agencies, boards, and commissions as provided by acts of Congress.⁹⁴

(c) *Quasi-Original Jurisdiction.* The Circuit Court of Appeals has a certain quasi-original jurisdiction over cases appealed from several administrative agencies. It is empowered to enforce, set aside or modify certain orders of the Federal Trade Commission, orders of the Interstate Commerce Commission, orders of the Board of Governors of the Federal Reserve Bank, orders of the Federal Communications Commission and orders of the Civil Aeronautics Board. It has jurisdiction of appeals from the Tax Court of the United States and Federal Power Commission; from certain orders of the Security and Exchange Commission, and wage orders of the Administrator of Wages and Hours Division of the Department of Labor. It has power either to enforce or review the orders of the National Labor Relations Board, as well as orders from other administrative agencies as provided by Acts of Congress. Appeals from the orders of the Commissioner of Internal Revenue are taken to the Tax Court of the United States and then to the Circuit Court of Appeals.⁹⁵

In the review of cases from these boards, the Circuit Court of Appeals does not take new testimony, but reviews the cases only on questions of law and the findings of the ordinary facts made by the board or commission. Where the findings are supported by substantial evidence, they are conclusive.⁹⁶

910; *Silver v. Federal Trade Commission*, 292 Fed. 752; *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182; *Rules of Civil Procedure*, 73-76. See 28 USC 346, 347. See also 18 USC 688 (Criminal Code and Criminal Procedure; 28 USC 225 (c) (bankruptcy); 28 USC 227 (interlocutory orders, receivership cases); *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 87 L. ed. 1185.

⁹⁴ 28 USC 347; 47 USC 402.

⁹⁵ 15 USC 21, 29, 45; 28 USC 225; 26 USC 870, 1141; 15 USC 78 (y), 79 (x); 16 USC 825 (1); 29 USC 160 (e) (e) and (f), 210. See also 7 USC 8, 9, 194; 15 USC 836 (b); 26 USC 273, 872, 1012.

⁹⁶ *Wilmington Trust Co. v. Helvering*, 316 U. S. 164, 86 L. ed. 1352; *Federal Trade Commission v. Raladam*, 316 U. S. 149, 86 L. ed. 1336 (findings not supported by evidence held not conclusive).

§ 184. **Supreme Court.** (a) *Original Jurisdiction.* The Supreme Court has original jurisdiction in all cases against ambassadors, other public ministers and consuls, and in cases in which a state is a party. Additional original jurisdiction cannot be conferred by Congress. Neither can jurisdiction be conferred upon the court by the consent of the parties. Rule 5 of the Revised Rules of the Supreme Court provides that cases on the original docket shall be governed, as far as may be by rules applicable to cases on the appellate docket. The right to commence a suit, however, must be obtained on special motion to the court.⁹⁷

(b) *Appellate Jurisdiction.* In all other cases to which the judicial power of the United States extends, the Supreme Court has appellate jurisdiction, both as to law and fact.⁹⁸

1. *State Supreme Courts.* The Constitution does not give the Supreme Court of the United States appellate jurisdiction to review the judgments of state courts in express terms. The Judiciary Act passed in 1789 gave the Supreme Court such jurisdiction.

This jurisdiction was sustained by Chief Justice Marshall in 1810 in the case of *Fletcher v. Peck*. Appellate jurisdiction is now defined by the Judicial Code, being United States Code, Title 28, Sections 344, 861(a) and 861(b). It provides for an appeal from a final judgment, decree, or decision in the highest appellate court of the state in which a decision in that case or suit could be had, deciding against the validity of a treaty or statute of the United States or deciding in favor of the validity of a state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

The Supreme Court, through a Writ of Certiorari, will review a final judgment or decree of the highest state court in which a decision could be had drawing in question the validity of a treaty or statute of the United States on the ground of being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or

⁹⁷ Const. Art. III, § 2, cl. 2; *Muskrat v. United States*, 219 U. S. 346, 55 L. ed. 246; *Marbury v. Madison*, 1 Cr. 137, 2 L. ed. 60; *Georgia v. Grant*, 6 Wall. 241, 18 L. ed. 848; *Texas v. Florida*, 306 U. S. 398, 83 L. ed. 817, 121 A. L. R. 1179; *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 89 L. ed. 1051 (original jurisdiction includes

quasi-sovereign interest which the state has in its economic development and the welfare of its citizens); *Nebraska v. Wyoming*, 325 U. S. 589, 89 L. ed. 1815.

⁹⁸ *Ex parte Republic of Peru*, 318 U. S. 578, 87 L. ed. 104. See also *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264.

claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under the United States. The power of review under this writ may be exercised as well where the Federal claim is sustained as where it is denied.⁹⁹

The Supreme Court holds itself strictly within the limits of the jurisdiction here laid down. It will not take jurisdiction to review a case thus brought to it merely on the ground that a Federal question might have formed the basis of decision of the case. It must appear that such a question actually did arise in the case and did form the ground of the judgment or decree of the state court, adverse to the appellant or the party applying for the writ of certiorari.¹⁰⁰

A case cannot be taken to the Supreme Court for review until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. For example, review of a decision of a division or department of the state supreme court will not be permitted.¹⁰¹

Application for review by certiorari is initiated by one of the parties to the suit through petition filed in the Supreme Court. An appeal is initiated by a notice of appeal.

2. *District Courts.* Appeals to the Supreme Court of the United States directly from district courts may be taken in cases tried by a three-judge court and in certain criminal cases defined in the Criminal Appeals Act.¹⁰²

3. *Circuit Court of Appeals.* Review of the decision of the circuit court of appeals by the Supreme Court is secured through a Writ of Certiorari. The writ does not issue as a matter of right, but only when so ordered by the Supreme Court. As a matter of fact, only about one-fifth of the applications for the writ are granted. All appeals and writs of error from the circuit court of appeals to the Supreme Court of the United States have been abolished.

⁹⁹ 28 USC 344 (b).

¹⁰⁰ 28 USC 344, 861 (a), 861 (b); *Fletcher v. Peck*, 6 Cr. 87, 3 L. ed. 162; *Nashville, C. & St. L. Ry. Co. v. White*, 278 U. S. 456, 73 L. ed. 452; *Great Northern Ry. Co. v. Minnesota*, 278 U. S. 503, 73 L. ed. 477.

¹⁰¹ *Gorman v. Washington Uni-*

versity, 316 U. S. 98, 86 L. ed. 1300. See also *Ex parte Davis*, 318 U. S. 412, 87 L. ed. 868.

¹⁰² 18 USC 682; 28 USC 47, 47a, 345 (1), 345 (2), 345 (3), 345 (4), 345 (5), 380; 15 USC 28, 29; 49 USC 44, 45; 7 USC 216, 217, 551, 561.

In addition to this procedure, Section 239 of the Judicial Code, as amended by the act of February 13, 1925, gives the circuit court of appeals the right to certify to the Supreme Court of the United States at any time any question or proposition of law concerning which instructions are desired by the circuit court of appeals from the Supreme Court of the United States. Upon the receipt of these applications for instructions, the Supreme Court may give the instructions on the question certified or, at its option, it may require the entire record of the case. Its entire authority is limited to certifying specific questions which can be answered by the Supreme Court without the examination of the whole case.¹⁰³

4. *Review of Other Federal Courts.* The Supreme Court has jurisdiction to review decisions of the United States Court of Appeals for the District of Columbia and also the Court of Claims by certification or by certiorari and not otherwise. These courts, with respect to review of their decisions in the Supreme Court, are on the basis of the circuit courts of appeal. They may also certify questions to the Supreme Court. In addition, decisions of the Court of Customs and Patent Appeals are reviewable by the Supreme Court by certiorari only. Review of the Supreme Court of the Philippine Islands is also by certiorari only.¹⁰⁴

5. *Courts—Decisions Not Reviewable.* The courts of Puerto Rico, the Virgin Islands, the Canal Zone, Alaska, China and Hawaii are not directly reviewable by the Supreme Court. Their cases go to the circuit courts of appeal of their respective circuits and stand for the purposes of ultimate Supreme Court review in the same position as any other cases in those courts.¹⁰⁵

¹⁰³ 28 USC 346, 347, 347 (a), 347 (b), 861 (a), 861 (b). ¹⁰⁵ 28 USC 225; 11 USC 1, 47, 48; 48 USC 1356, 1406 (b),

¹⁰⁴ 28 USC 288, 308, 346, 347. 1406 (d), 1406 (e).

CHAPTER 17

POWERS OF CONGRESS

(Except Regulation of Commerce)

It may be truly said of every government, as well as that of the United States, that it has a right to pass only such laws as are necessary and proper to accomplish the objects entrusted to it.

—Alexander Hamilton

§ 185. **Organization and Government.** The organization and government of Congress are provided for in Article I. of the Constitution. Section 1 reads:

“All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives.”

The Constitution has vested Congress as a body with all needful powers to regulate its own organization and government. In addition, each house possesses the necessary parliamentary powers, which are usually inherent in governmental assemblies. These powers include the right to keep a journal of its proceedings; to be the judge of the election and qualifications of its members; to make its own rules of procedure; to punish its members for disorderly behavior; to expel a member; and to punish a member, as well as others, for contempt of its authority.¹ In exercising these powers, the Senate or the House acts as a judicial tribunal and it may compel the attendance of witnesses, either through subpoena or a warrant of arrest, and it may enter a final judgment under circumstances similar to a court of justice.²

Congress possesses no power over the election of senators and representatives not defined by the Constitution of 1787 and its amendments. The right to vote for representatives in Congress,

¹ Const. Art. I, § 5.

² *Barry v. United States*, 219 U. S. 597, 73 L. ed. 867; *McGrain v. Daugherty*, 273 U. S. 135, 71 L. ed.

580; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

however, is derived from the Constitution, not from the states, except to the extent that Congress permits the states to prescribe the qualifications of electors. This right extends to primary elections in which candidates for representatives are being nominated, and is a right secured to those citizens and inhabitants of a state entitled to exercise it.³

§ 186. Privileges of Members of Congress. The members of both Houses of Congress enjoy certain privileges while engaged in performing services in the line of their official duty. In all cases, except treason, felony and breach of the peace, they are privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they may not be questioned in any other place.⁴

The purpose of the privilege is to protect the rights of the people through relieving a senator or a representative from absenting himself from his public duties during a session of Congress for the purpose of defending his private suits in court or in suffering arrest.⁵ It applies to delegates from territories as well as the states.⁶ The privilege is not limited to words spoken in debate or uttered in a speech, but applies also to written reports presented by committees, to resolutions, to the act of voting, and to every other act resulting from the nature and execution of the office of a senator or representative.⁷ "These privileges," said Chief Justice Parson of the Supreme Court of Massachusetts, "are secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to exercise the functions of their office without fear of prosecution, civil or criminal."⁸

The privilege is limited to a reasonable time, in addition to the actual session of Congress for each person, to go to and return

³ United States v. Classic, 313 U. S. 299, 85 L. ed. 1368. See also Newberry v. United States, 256 U. S. 232, 65 L. ed. 913 and Grovey v. Townsend, 294 U. S. 699, 79 L. ed. 1292 for prior rule.

⁴ Const. Art. I, § 6, cl. 1.

⁵ Doty v. Strong, 1 Pinn. (Wis.) 84.

⁶ Doty v. Strong, 1 Pinn. (Wis.) 84.

⁷ Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; Kilbourn v. Thompson, 103 U. S. 204, 26 L. ed. 377.

⁸ Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189.

from such session.⁹ It extends only to arrest or detention in civil process or in civil cases.¹⁰ It does not extend to the service of mere citations or to a writ or summons in civil cases.¹¹ All criminal offenses are excluded from the privilege. Especially is this true of election offenses. The Supreme Court has held that a member of Congress who received money from officers and employees of the United States for the purpose of promoting his nomination at the primaries as a candidate for re-election to Congress violated the Federal Corrupt Practices Act. Upon conviction, he would be subject to fine and imprisonment and could be expelled from membership.¹²

Congressmen are not exempted from criticism in the press or by the people. Neither does this privilege shield them from the political consequences of their utterances and votes. Each senator or representative is subject to discipline by the body of which he is a member for what he may say in a speech or debate. His remarks may be expunged from the record, or, in an extreme case, he may be expelled from membership by a vote of two-thirds of the members.¹³

§ 187. Source and Development of Power. The powers of Congress have been derived from a changing historical background. The development of these powers illustrate the progressive growth of our Constitution.

The Fundamental Law of 1787 defined the granted or specific powers. In 1819 Chief Justice Marshall announced the doctrine of implied powers in the case of *McCulloch v. Maryland*.¹⁴ Under this doctrine these powers expanded constantly for a period of a hundred years. Then came the new doctrine of powers not implied from granted powers but implied from other implied powers which was announced in 1920 in *Ruppert v. Caffey*.¹⁵ Our Constitution still continued to grow and, in 1936 in *United States v.*

⁹ *Hoppin v. Jenekes*, 8 R. I. 453, 5 Am. Rep. 597.

¹⁰ *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278.

¹¹ *Long v. Ansell*, 293 U. S. 76, 79 L. ed. 208; *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632.

¹² *Williamson v. United States*,

207 U. S. 425, 52 L. ed. 278; *United States v. Wurbach*, 280 U. S. 396, 74 L. ed. 508. See also Chap. 23, § 298, *infra*; 18 USC 200; 2 USC 241-256.

¹³ Const. Art. I, § 5, cl. 2.

¹⁴ 4 Wheat. 316, 4 L. ed. 579.

¹⁵ 251 U. S. 264, 64 L. ed. 260.

Curtiss-Wright Export Corp.,¹⁶ Justice Sutherland announced the far-reaching doctrine that our government possessed all the inherent powers of a sovereign nation in respect to external affairs. While under the Fundamental Law of 1787, the powers of Congress were limited to the powers expressly granted, under the enlarged Constitution of today, they include (a) inherent powers; (b) granted or specific powers; (c) powers implied from granted powers; and (d) powers implied from other implied powers.

§ 188. Inherent Powers. The origin and nature of the inherent powers of the Federal government have been discussed in former sections.

These powers comprehend all external sovereignty, including the power to control the sale of arms and munitions to belligerent nations; to acquire territory by discovery and occupation; to expel undesirable aliens; to make international agreements; to declare and wage war; to grant letters of mark and reprisal; to make rules concerning captures on land and water; to conclude peace; to make treaties; to maintain diplomatic relations with other nations; and to regulate foreign commerce. The fact that some of these powers were enumerated in the Constitution was merely confirmatory. All the powers exist independent of the Constitution as inherently inseparable from the conception of nationality.¹⁷

Congress, therefore, has the inherent power to legislate in respect to foreign and external affairs. This power, however, differs fundamentally from that of legislating concerning domestic and internal affairs, which rest upon the powers granted by the Constitution of 1787 or implied from such powers. It also differs from any inherent powers which may exist in the states. Such powers are exercised by the state governments.¹⁸

Congress possesses no inherent powers in respect to the internal affairs of the states.

¹⁶ 299 U. S. 304, 81 L. ed. 255.

¹⁷ See Chap. 1, § 7; Chap. 7, § 76; Chap. 9, §§ 78, 79; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255. See also *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905; Chap. 18, § 235.

¹⁸ *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160. See also *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956; *Hammer v. Dagenhart*, 244 U. S. 251, 62 L. ed. 1101; Chap. 9, § 68, 69.

§ 189. Enumerated Powers. The enumerated powers of Congress are those specifically granted by the written Constitution. These powers relate to the administration of internal and domestic affairs.

Formerly, the courts held that the enumerated powers defined the powers of Congress in external, as well as internal, affairs, but since the announcement of the decision in the *Curtiss-Wright Export Corporation* case, this is no longer true. The theory upon which the Constitution was written, was that the Federal government should be granted from the general mass of powers held by the states in 1787 only such powers as it was thought desirable to vest in the national government, leaving those powers not included still in the states. And since the states possessed only internal and domestic powers, these were the only powers that could be effectively granted or included in the formal written Constitution.¹⁹

This doctrine may be traced back to the period of the ratification of the written Constitution by the states, when Rufus King forcefully stated: "The states were not sovereign in the sense contended for by some. They did not possess the peculiar feature of sovereignty—they could not make war, nor peace, nor alliances nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign power whatever. They were deaf for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defense or offense, for they could not of themselves raise troops, or equip vessels for war."²⁰

Every Act of Congress, therefore, relating to internal or domestic affairs to be valid must be expressly or impliedly in the exercise of one of the enumerated powers, which are set forth in Section 8 of Article I. of the Constitution. No power, however, has been granted in the Preamble to the Constitution by the words "promote the general welfare and secure the blessings of liberty."²¹

§ 190. Implied Powers. The last clause of Section 8 of Article I. of the Constitution of 1787 has become the foundation of the doctrine of implied powers. This clause reads:

¹⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

²⁰ 5 *Elliott, Debates*, 212. See also *Story, Constitution of the*

United States, §§ 198-217.

²¹ *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 3 *Ann. Cas.* 765.

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

The epochal pronouncement of Chief Justice Marshall, construing this clause, was discussed in section 59 of Chapter 7.

To this pronouncement, Justice Strong in 1870 added: “It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. . . . We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list is made, but they are grouped in the last clause of section eight of the first article, and granted in the same words in which all other powers are granted to Congress.”²²

There is not in the whole Constitution a single grant of power which does not draw after it other powers not expressed which are vital to its exercise. These powers are auxiliary and subordinate to the expressed powers.²³ There is no distinction between the scope or incidents of an express power and those of an implied power. The result is that, while the Federal government is one of enumerated powers, it has full attributes of sovereignty within the field of its activity.²⁴

This doctrine of implied powers has made the Constitution a living organism. It has enabled the Supreme Court to legalize the required regulations for the development and growth of our country.

²² Legal Tender Cases, 12 Wall. 533, 20 L. ed. 287.

²³ Anderson v. Dunn, 6 Wheat. 225, 5 L. ed. 242.

²⁴ Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 261; Massachusetts v. Nickerson, 236 Mass. 281, 128 N. E. 237, 10 A. L. R. 1568.

It has enabled Congress to expand our criminal jurisprudence; to create banks; to regulate rates of railroads and telephone and telegraph companies; to maintain an elaborate system for the collection of customs and duties; to build post offices and post roads and a myriad of public buildings; to build a system of national highways; to maintain a system of national parks; to develop many other government projects such as irrigation districts, and the generation of electric power; and to encourage patriotism. Speaking generally, the words necessary and proper have been construed to give Congress the power to do all things that are proper, conducive, or appropriate for the best interests of the people of the United States within the limits defined by the Constitution.²⁵

§ 191. Power to Investigate. Congress possesses the auxiliary power to conduct investigations in aid of prospective legislation. This power was so regarded and employed by the legislatures of the states prior to the adoption of the Federal Constitution in 1787, and both Houses of Congress have employed it up to the present time. The practical construction of this power by the legislature has fixed it as one of the permanent powers to be exercised under our Constitution of today. The power is essential and appropriate to the legislative function.²⁶ Its exercise is not an encroachment on judicial power.²⁷

The power may be exercised by committees and by administrative boards and commissions. These bodies have the power to summon persons, who are not members, to attend any meeting, which they are authorized to hold, as witnesses, and if the person so summoned refuses to testify he may be punished for contempt. In the case of administrative boards, contempt proceedings are usually enforced through the courts.²⁸

²⁵ *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160; *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 33, 23 L. ed. 196; *Bay City First Nat. Bank v. Union Trust Co.*, 244 U. S. 416, 61 L. ed. 1233; *United States v. Hall*, 98 U. S. 346, 25 L. ed. 180; *McCulloch v. Maryland*, 4 Wheat. 411, 4 L. ed. 579; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 679,

40 L. ed. 576; *United States v. Griffin*, 58 F. (2d) 674.

²⁶ *McGrain v. Daugherty*, 273 U. S. 175, 71 L. ed. 580, 50 A. L. R. 1.

²⁷ *Ex parte Battelle*, 207 Cal. 227, 277 Pac. 725, 65 A. L. R. 1497.

²⁸ 2 USC 292 (this act makes it a misdemeanor for any person summoned by either House of Congress to refuse to give evidence or to produce papers upon any matters be-

The power to investigate is not a general power to inquire into private affairs of corporations or other individuals, and to compel disclosures. Neither Congress nor administrative agencies may go on fishing expeditions into private papers or through all records in the hope that something tending to incriminate a corporation or other person might be discovered. The power extends only to such limited inquiry as is necessary to enable Congress to exercise the general legislative powers held by it. A witness may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.²⁹

§ 192. Limitations Upon the Powers of Congress. The limitations upon the powers of Congress may be divided into four classes: (a) General limitations; (b) express limitations upon general powers; (c) express limitations upon certain specified powers; and (d) implied limitations.

(a) *General Limitations.* The general limitations upon the powers of the Federal government are found in the Ninth and Tenth Amendments. The Ninth Amendment says that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment, relating to the reservation of powers, provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The purpose of the Ninth Amendment, according to Justice Story, was to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and e converso, that a negation in particular cases implies an affirmation in all others. This amendment was suggested by the reasoning in the Federalist Number 84.³⁰ The Tenth Amendment was adopted to emphasize

fore the House summoning the witness or any committee thereof); Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Marshall v. Gordon, 243 U. S. 521, 61 L. ed. 881, L. R. A. 1917 F 279, Ann. Cas. 1918 B 371; Journey v. MacCracken, 294 U. S. 125, 79 L. ed. 802; Ex parte Battelle, 207 Cal.

227, 277 Pac. 725, 65 A. L. R. 1497.

²⁹ Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 68 L. ed. 696; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

³⁰ Story on the Constitution, § 1905.

that the government of the United States under the Constitution of 1787 was one of delegated powers only, and is designed to clarify and limit the powers granted in clause 18 section 8 of Article I. granting Congress power to make all laws necessary and proper for carrying into effect the powers enumerated in that section.³¹

(b) *Express Limitations on General Powers.* The express limitations upon the general powers of Congress are contained largely in Amendments I. to VIII., inclusive, and in Amendments XV. and XIX.

These limitations relate to the establishment and exercise of religion, the freedom of speech and the press and the right to assemble and petition the government; the regulation of the militia and the right to bear arms; the quartering of soldiers; unlawful searches and seizures; indictment by a grand jury, being twice in jeopardy of life and limb, being required to testify against one's self, being deprived of life, liberty or property without due process of law, and the taking of private property without compensation; the right to a speedy and public trial by an impartial jury; the finality of a jury trial in civil cases;³² excessive bail and fines and cruel and unusual punishments;³³ and the denial of the right of suffrage on account of race, color or sex.³⁴ Other limitations relate to the drawing of money from the treasury except through appropriation and the granting of titles of nobility.³⁵

(c) *Express Limitations upon Certain Specified Powers.* The following limitations are apparent from an examination of the powers granted by the Constitution. Congress has the power to enact legislation, but no bill of attainder or ex post facto law shall be passed. Congress has the power to lay and collect taxes, but all duties, imposts and excises shall be uniform throughout the United States and no capitation or other direct tax, except an income tax, shall be laid unless in proportion to the census enumeration, and no tax or duty shall be laid on articles exported from any state. Congress has power to regulate commerce with foreign nations and among the states, but no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to or from one state be obliged to enter clear or pay duty in another. Congress has the power to enact laws regulating naturalization and bankruptcy, but these

³¹ See § 190, this chapter.

³² See Amendments I-VII.

³³ Amendment VIII.

³⁴ Amendments XV and XIX.

³⁵ Const. Art. I, § 9.

laws must be uniform throughout the United States. Congress has the power to establish courts, but such courts shall be inferior to the Supreme Court of the United States.

Congress has the power to raise and support armies, but no appropriation for this purpose shall be for a period longer than two years. Congress may call forth the militia, but only for the purpose of suppressing insurrection or repelling invasion. It may provide for organizing, arming and disciplining the militia and for governing such part as may be employed in the service of the United States, but the appointment of officers and the training of the militia, according to the discipline prescribed by Congress, is reserved to the states. Congress may declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted. Congress may admit new states into the Union, but no new state shall be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned. Congress may alter the regulations of the states as to the time, place and manner of holding elections for senators and representatives, except as to the places of choosing senators, and, under the sixteenth amendment, their election by the people.³⁶

(d) *Implied Limitations.* In addition to the general and express limitations in the Constitution, there are certain implied limitations upon the powers of Congress arising from the nature of our government and the distribution of its powers among the legislative, executive and judicial departments. Congress cannot pass laws not included in the powers held by the Federal government.³⁷ It cannot prevent a state from discharging its ordinary functions of government.³⁸ It cannot legally encroach upon the executive and judicial departments, or usurp the functions of these departments.³⁹ It cannot delegate its legislative powers or authorize their exercise by any other person, body or agency.⁴⁰ It cannot abdicate or surrender any of the powers granted to it by the Constitution to any other department of the

³⁶ Const. Art. I, §§ 4, 8; Art. III, § 3; Art. IV, § 3.

³⁷ *Linder v. United States*, 268 U. S. 5, 69 L. ed. 819, 39 A. L. R. 229.

³⁸ *Educational Film Corp. v. Ward*, 282 U. S. 379, 75 L. ed. 400, 71 A. L. R. 1226.

³⁹ *State v. Leslie*, 100 Mont. 449, 50 P. (2d) 959, 101 A. L. R. 1329.

⁴⁰ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446; *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, Ann. Cas. 1912 D 734, 34 L. R. A. (N. S.) 834.

government, or to the states or to corporations or other private parties. It cannot enact laws intended to operate beyond the jurisdiction of the United States.⁴¹ It cannot pass any law curtailing our independence as a nation, or altering the form of our government. It has no power to subject the Federal government or any state government to the influence or domination of a foreign nation. These limitations are not embodied in the Constitution, but they are as effective and controlling as if they were specifically enumerated with the express limitations. The limit of the powers of the Federal government has been discussed in section 27a.

§ 193. Delegation of Power. Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested. The Constitution provides that all legislative powers shall be vested in Congress, and it is a cardinal principle of our representative government that it cannot escape its duties and responsibilities by delegating its powers to other bodies, commissions, or officers, or even to the states or to the people at large.⁴²

The field of Congress, however, involves many varieties of legislative action, and frequently Congress has found it necessary to use the President and other officers of the executive branch of the government within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers, to make public regulations interpreting a statute and directing details of its execution.⁴³ The distinction lies between the power to make a law which involves discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter there is no valid objection.⁴⁴ Under this authority Congress has delegated to the President the power to suspend, for such time as he shall deem just, the provisions of an act allowing the free import of certain commodities. It has

⁴¹ *United States v. Flores*, 289 U. S. 137, 77 L. ed. 1086.

⁴² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446.

⁴³ *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294; *Uhden v. Greenough*, 181 Wash. 412, 43 P. (2d) 983, 98 A. L. R. 1181; *Florida*

v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *Livesay v. DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A. L. R. 422.

⁴⁴ *Hampton & Co. v. United States*, 276 U. S. 394, 72 L. ed. 624.

given the Secretary of War power to approve plans for a bridge over East River in New York harbor.⁴⁵ It has authorized the Secretary of Agriculture to make rules and regulations covering forest reservations, and making violations thereof a crime.⁴⁶

Congress may also delegate administrative and nonlegislative functions to Boards and Commissions, or to executive officers. It may authorize them to do things which it might properly do, but which it cannot do itself advantageously or successfully. It may give them the power to determine facts and conditions upon which the operation of a statute depends. The delegation of this power is necessary in order to give flexibility and practicality to the full performance of legislative functions. In order for this delegation of authority to be legal, it is necessary for Congress to lay down policies and establish standards, leaving only to the selected instrumentalities the making of subordinate rules within the prescribed limits, and the determination of facts to which the policy and standards shall apply.⁴⁷ The Supreme Court has held that the public good cannot be prescribed as a standard for an administrative officer's action.⁴⁸

By virtue of this authority Congress, under the provisions of the Interstate Commerce Act and amendments thereto, provided a Code of Laws relating to the activities of interstate carriers, and set up an expert body with power to act, upon notice and hearing, and to fix rates, fares and charges, and to issue other orders.⁴⁹ It has also given other administrative agencies certain discretionary powers, and has authorized national banks to act as fiduciaries.⁵⁰ Boards, commissions and officers having administrative and quasi-judicial powers have been discussed in the study of Federal courts, and of administrative agencies.⁵¹

The delegation of legislative authority, however, to private individuals or to the majority of a group of individuals who could

⁴⁵ *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971.

⁴⁶ *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563.

⁴⁷ *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 77 L. ed. 175; *Schechter Poultry Corp. v. United States*, 295 U. S. 723, 79 L. ed. 1570, 97 A. L. R. 947; *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834.

⁴⁸ *Panama Refining Co. v. Ryan*,

293 U. S. 388, 79 L. ed. 446.

⁴⁹ *Interstate Commerce Commission v. Goodrich Transit Co.*, 244 U. S. 194, 56 L. ed. 729.

⁵⁰ *Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co.*, 164 Miss. 286, 144 So. 700; 12 USC 248; *Breedlove v. Freudenstein*, 89 F. (2d) 324, 112 A. L. R. 777.

⁵¹ See Chap. 15, § 161, *supra*; Chap. 18, §§ 209, 224-233. See generally Chap. 19, *infra*.

control a dissentient minority is illegal. In holding a section of the Guffey-Snyder Coal Act illegal, in which a majority of the miners was given power to fix minimum wages for a district or group of districts, Justice Sutherland asserted that: "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process of law clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."⁵²

But the submission of a statute to the referendum of a group interested in the operation of the statute as to when the operation of the statute shall begin is not a delegation of power. Discussing the Tobacco Inspection Act, in which the Secretary of Agriculture was authorized to submit the operation of the act to the growers, Chief Justice Hughes observed: "So far as the growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market unless two-thirds of the growers voted in favor of it. . . . Congress . . . may leave the determination of such time to the decision of the Executive, or, as often happens in matters of state legislation, it may be left to popular vote of the residents of the district affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into

⁵² *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160. See also *Shechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947; *Eubank v.*

Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L. R. A. (N. S.) 1123; *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210, 86 A. L. R. 654.

effect being made dependent by the legislature on the expression of the voters of a certain district." ⁵³

These restrictions upon the authority of Congress to delegate its powers are limited largely to internal or domestic affairs. Except in the case of treaties, the President already holds a plenary and exclusive power as the sole organ of the Federal government in the field of international relations. This power is not necessarily a delegated one, and does not require an Act of Congress for its exercise, but must be exercised in subordination to the applicable provisions of the Constitution. ⁵⁴

§ 194. Delegation of Power to States. Congress cannot delegate its own legislative power to the states, and it cannot vest in the state legislatures power to prescribe laws, rules and regulations for the government of the national tribunals or the offices of the national government. Neither can it enlarge the powers of the states. ⁵⁵

Congress may, however, relinquish to the states the power to legislate upon a subject over which it and the states have concurrent jurisdiction. For example, an Act of Congress divesting imports of their interstate character at an earlier date than would otherwise have been the case is valid. ⁵⁶ The recognition by the Federal Bankruptcy Act of the exemption laws of the states was also held valid. ⁵⁷

§ 195. Exclusive and Concurrent Powers. Some of the powers vested in Congress by the Constitution are exclusive. Other powers may be exercised concurrently by the states in the absence of action by the national government. The states may exercise concurrent or independent power, except in the following instances:

(a) Where the power is lodged exclusively in the Federal government by the Constitution. An example of this power is the

⁵³ *Currin v. Wallace*, 306 U. S. 1, 83 L. ed. 441. See also *United States v. Rock Royal Co-operative*, 307 U. S. 533, 83 L. ed. 1446.

⁵⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

⁵⁵ *Moore v. Allen*, J. J. Marsh.

(Ky.) 651; *In re Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 11 A. L. R. 1145.

⁵⁶ *In re Rahrer*, 140 U. S. 545, 35 L. ed. 572.

⁵⁷ *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113.

exercise of the right of government over the District of Columbia. Another example is the power to borrow money on the credit of the United States.

(b) Where the power is given to the United States by one provision of the Constitution and by another provision is prohibited to the states. Examples of such powers are: The power to coin money; the power to enter into a treaty or alliance with a foreign country, or to engage in war.

(c) Where from the nature and subjects of the power it must necessarily be exercised by the national government exclusively. This is true where the subject affected by the power is national in scope or can be governed only by uniform laws. For example: The establishment of post offices and post roads, or the regulation of interstate commerce.⁵⁸

In cases not coming under any of the foregoing subdivisions the state may legally enact legislation regulating the subject of the power until Congress shall have exercised the power with which it is vested. When Congress acts, however, its authority immediately supersedes all existing state legislation on the same subject and prohibits further state action until it shall again withdraw from the field. An example of this rule is our bankruptcy legislation. The bankruptcy law of 1867 was repealed in 1878. From 1878 to 1898 there was no national bankruptcy law and many of the states passed insolvency laws. As soon as the bankruptcy law of 1898 was enacted, the insolvency laws of the different states were superseded.⁵⁹

§ 196. Taxation. A general power to lay and collect taxes was given Congress in the Constitution. It provided:

"That Congress shall have power to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States."⁶⁰

The purpose of this provision was to enable the Federal government to procure revenue independent of the states. "A govern-

⁵⁸ *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Missouri Pac. R. Co. v. Porter*, 273 U. S. 341, 71 L. ed. 672.

⁵⁹ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Northern Securities*

Co. v. United States, 193 U. S. 347, 48 L. ed. 679, 704; *Ex parte Siebold*, 100 U. S. 392, 25 L. ed. 717, 724.

⁶⁰ Const. Art. I, § 8, cl. 1.

ment ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible free from every other control but a regard to the public good," wrote Hamilton, ". . . the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community. As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the states in their collective capacities, the Federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes."⁶¹ Under this provision the taxing power of Congress is unlimited. The only requirement placed upon it was the observance of two rules; namely, the rule of uniformity when it laid duties, imposts, and excises; and the rule of apportionment, according to the census, when it laid a direct tax.⁶² The taxes imposed may be onerous, burdensome and prohibitive.⁶³ They may even embarrass and destroy. Courts can put no limitations upon such exercise of power.⁶⁴ Congress may select the objects upon which an excise may be laid.⁶⁵ The mode, manner and means of levying and collecting these taxes is also left to the wisdom of Congress, and it may employ all means which it may consider legitimate or necessary.⁶⁶ "The pertinent taxing clause provides in general terms that taxes may be laid to pay the debts and provide for the common defense and general welfare of the United States," remarked Justice Sutherland. "Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the law-making department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard."⁶⁷

The word taxes is a general term. It signifies an exaction for the support of the government. In this clause of the Constitution it is used in the more confined sense in contradistinction to duties and imposts.⁶⁸ The term does not connote expropriation of money

⁶¹ The Federalist No. XXXI.

⁶² *Hylton v. United States*, 3 Dall. 174, 1 L. ed. 556.

⁶³ *Trusler v. Crooks*, 300 Fed. 996.

⁶⁴ *Kelly v. Lewellyn*, 274 Fed. 108.

⁶⁵ *McCray v. United States*, 195 U. S. 59, 49 L. ed. 78, 1 Ann. Cas. 561.

⁶⁶ *United States v. 288 Packages of Merry World Tobacco*, 103 Fed. 453.

⁶⁷ *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 81 L. ed. 1122.

⁶⁸ *United States v. Fifty-nine Demijohns Aguadiente and Four Barrels of Cigarettes*, 39 Fed. 401.

from one group for the benefit of another.⁶⁹ The words duties, imposts, and excises apparently embrace all forms of taxation contemplated by the Constitution, and are used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.⁷⁰ The words were used in the Constitution in their natural and obvious sense.⁷¹

The United States may tax for three purposes: To pay the debts, to provide for the common defense and to promote the general welfare. The term debts includes equitable as well as legal claims.⁷² This power includes the power not only to build forts, arsenals and other defenses, but also to build large power projects. The Supreme Court has held that neither the taxpayer, nor the state, nor a corporation which has been injured by competition financed by the expenditure of public funds has sufficient interest to contest the validity of the expenditures of the national government.⁷³

Congress may tax for the purpose of regulation. Where the tax bears a reasonable relation to a power conferred by the Constitution, the fact that Congress may have been equally or incidentally impelled by a motive of regulation will not invalidate the tax. "Every tax is in some measure regulatory," remarked Justice Stone. "To some extent it interposes an economic impediment to the activity taxed. But a tax is not any the less a tax because it has a regulatory effect."⁷⁴

Duties, imposts, and excises must be uniform. This means a geographical uniformity, requiring the statute to operate uniformly and with the same force and effect in every place where the subject is found.⁷⁵ This is true even though the actual operation

⁶⁹ *United States v. Butler*, 297 U. S. 1, 80 L. ed. 477, 102 A. L. R. 914.

⁷⁰ *Thomas v. United States*, 192 U. S. 370, 48 L. ed. 481.

⁷¹ *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 619, 39 L. ed. 1108.

⁷² *United States v. Realty Co.*, 163 U. S. 440, 41 L. ed. 215.

⁷³ *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 21 F. Supp. 947; *Alabama Power Co.*

v. Ickes, 302 U. S. 464, 82 L. ed. 374.

⁷⁴ *Sonzinsky v. United States*, 300 U. S. 506, 81 L. ed. 772; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *McCray v. United States*, 195 U. S. 27, 45 L. ed. 78, 1 Ann. Cas. 561; *United States v. Doremi*, 249 U. S. 86, 63 L. ed. 493.

⁷⁵ *Head Money Cases*, 112 U. S. 596, 28 L. ed. 798; *LaBelle Iron Works v. United States*, 256 U. S. 377, 65 L. ed. 998; *Florida v. Mel-*

or working of the law may be wholly different in one state from that in another.⁷⁶ The requirement is satisfied when a particular impost is uniform upon all subjects of the same kind or class.⁷⁷ It does not apply to goods imported from the Philippine Islands or Puerto Rico.⁷⁸ An inheritance tax increasing progressively as to the size of the estate and the remoteness of the beneficiary's relationship does not violate the requirement of uniformity.⁷⁹

An income tax law was made possible by the adoption of the Sixteenth Amendment. This Amendment provided that "the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census enumeration." It was adopted in 1913 after the Supreme Court had held such a tax unconstitutional as being a direct tax which must be apportioned among the states according to representation.⁸⁰

Since the adoption of the Constitution, a sharp difference of opinion has existed as to the power of Congress under the general welfare clause. As now defined legislation under the clause is limited to the power to tax and to appropriate the revenue so raised for the purpose of paying the nation's debts and making provision for the nation's welfare; the power to appropriate being as broad as the power to tax. Congress is not empowered to legislate generally for the general welfare.⁸¹

Our concept of the general welfare, however, is constantly changing. "Needs that were narrow or parochial a century ago," wrote Justice Brandeis, "may be interwoven in our day with the well being of the nation. What is critical or urgent changes with the times." He made this remark in holding the Social Security Act constitutional in 1937.⁸² The line of demarcation between a general welfare in aid of which it may not appropriate funds is determined largely by the fact of whether the problem or project

lon, 273 U. S. 12, 71 L. ed. 511;
Fernandez v. Wiener, — U. S. —,
90 L. ed. —.

⁷⁶ Darling v. Berry, 13 Fed. 659.

⁷⁷ Tway Coal Co. v. Glenn, 12 F.
Supp. 570.

⁷⁸ Puerto Rico Brokerage Co. v.
United States, 76 F. (2d) 605.

⁷⁹ Knowlton v. Moore, 178 U. S.
1, 44 L. ed. 969.

⁸⁰ Pollock v. Farmers Loan &

Trust Co., 158 U. S. 601, 39 L. ed.
1108.

⁸¹ United States v. Butler, 297 U.
S. 1, 80 L. ed. 477, 102 A. L. R.
914.

⁸² Helvering v. Davis, 301 U. S.
619, 81 L. ed. 1307, 109 A. L. R.
1319. See also Stewart Machine
Co. v. Davis, 301 U. S. 548, 81 L.
ed. 1279.

is national in scope or local merely.⁸³ For example Congress may appropriate money for public works;⁸⁴ for relieving general economic distress;⁸⁵ and for the establishment of the Home Owners Loan Corporation.⁸⁶ It cannot, however, appropriate federal funds for local or state benefit,⁸⁷ such as a loan to a municipality for an electric plant in order to lower local electric rates.⁸⁸

The power of the Federal government to tax is concurrent with that of the state governments. "Both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects," wrote Justice White, "but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government."⁸⁹ If the relative claims of these governments should conflict that of the United States as the supreme authority will prevail.⁹⁰ Neither government may, however, destroy the other nor curtail in any substantial manner the exercise of its powers. Neither, therefore, can extend its taxing powers so as to impair seriously the taxing power of the government imposing the tax or the functions of the government affected by it.⁹¹ The Federal government cannot tax an instrumentality of the state government, and the state government cannot tax an instrumentality of the Federal government.⁹² The immunity, however, does not prevail where the state is engaged in essentially nongovernmental functions, such as the sale of liquor and other commercial activi-

⁸³ *First Federal Savings & Loan Ass'n v. Loomis* (C. C. A.) 97 F. (2d) 831.

⁸⁴ *School Dist. No. 37, Clark County, Washington v. Isackson* (C. C. A.) 92 F. (2d) 768.

⁸⁵ *Greenwood County v. Duke Power Co.* (C. C. A.) 81 F. (2d) 986.

⁸⁶ *Walker v. Home Owners' Loan Corp.*, 25 F. Supp. 589.

⁸⁷ *United States v. Query*, 21 F. Supp. 784.

⁸⁸ *Washington Water Power Co. v. City of Coeur d'Alene*, 9 F. Supp. 263; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. ed.

543; *Alabama Power Co. v. Ickes*, 302 U. S. 464, 82 L. ed. 374.

⁸⁹ *Knowlton v. Moore*, 178 U. S. 1, 44 L. ed. 969.

⁹⁰ *Liberty Mutual Ins. Co. v. Johnson Shipyards Corp.* (D. C. N. Y.) 300 Fed. 952.

⁹¹ *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 78 P. (2d) 731, 117 A. L. R. 838.

⁹² *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466; *New York v. Graves*, 299 U. S. 401, 81 L. ed. 306; *McCulloch v. Maryland*, 4 Wheat. 421, 4 L. ed. 605.

ties.⁹³ Neither does it extend to the income of employees of corporations or other Federal governmental instrumentalities such as the Home Owners Loan Corporation, especially when Congress has failed to provide for such exemption.⁹⁴

Formerly, the Federal government was not permitted to tax state officers and employees, and the state governments were not permitted to tax Federal officers and employees. But in an amendment to the Income Tax law adopted April 12, 1939, Congress extended the provisions of the law to include personal services of an officer or employee of a state, or any political subdivision thereof, or any agency or instrumentality of any such state or subdivision.⁹⁵ At the same time the United States consented to the taxation of compensation received after December 31, 1938 for personal service of any officer or employee of the United States, or any territory or possession or subdivision thereof, the District of Columbia, or any agency or instrumentality of any of the foregoing governmental subdivisions, by any taxing authority, state or local, having jurisdiction to tax such compensation, provided that such taxation did not discriminate against such officer or employee because of the source of his compensation.⁹⁶

The reason for this comity between the Federal government and the state governments was expressed seventy years earlier by Justice Miller. "No one will contend," he said speaking of state tax legislation, "that when a man becomes an officer of the Federal government he ceases to be subject to the laws of the state. . . . The agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states."⁹⁷

⁹³ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261.

⁹⁴ *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466.

⁹⁵ 26 USC 22; *Helvering v. Gerhardt*, 304 U. S. 405, 82 L. ed. 1427.

⁹⁶ 5 USC 84a.

⁹⁷ *First Nat. Bank v. Kentucky*,

9 Wall. 353, 19 L. ed. 707. For cases, now overruled, holding that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, see *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466, and note by Justice Stone, 83 L. ed. 934.

§ 197. **Money and Fiscal Powers.** The money and fiscal powers of Congress are embodied in the following provisions of the Constitution :

“To borrow money on the credit of the United States.”

“To coin money, regulate the value thereof and of foreign coin.”

“To provide for the punishment of counterfeiting the securities and current coin of the United States.”⁹⁸

In order to vest the power to coin money and emit bills of credit exclusively in the Federal government, the Constitution further provided :

“No state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts.”⁹⁹

The power to borrow money was vested in the Federal government for the safety and welfare of the entire people, and has received a broad construction. It is the power to raise money for the public use on the pledge of the public credit, and may be used to meet either the present or the anticipated expenses and liabilities of the government.¹⁰⁰ It is subject to no greater limitation than the power to tax or to make appropriations for the general welfare.¹⁰¹ It includes the power to issue, in return for money borrowed, in any appropriate form of stocks, bonds, bills of credit or notes. The forms of obligations issued are bonds, treasury notes and other evidence of debt.¹⁰² This power, together with the other fiscal powers, has enabled the national government to legislate regarding gold bullion and to treat it as affected with a public interest.¹⁰³ Under this power, together with the power to regulate commerce, to pay the public debts and other powers, Congress is authorized to establish the Federal Reserve Bank, Federal Land Banks, Federal Home Loan Bank, as well as to charter other national banks.¹⁰⁴

Congress is clothed with direct and plenary powers of legislation over the subject of coining money and regulating its value. It may enact laws regulating the subject in every detail, and the

⁹⁸ Const. Art. I, § 8, cls. 2, 5, 6.

⁹⁹ Const. Art. I, § 10, cl. 1.

¹⁰⁰ Legal Tender Cases, 110 U. S. 444, 28 L. ed. 204.

¹⁰¹ United States v. Kay, 89 F. (2d) 19.

¹⁰² Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204; McCulloch

v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank, 9 Wheat. 738, 6 L. ed. 204.

¹⁰³ Campbell v. Chase Nat. Bank, 5 F. Supp. 156.

¹⁰⁴ Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L. ed. 577.

conduct and transactions of individuals in relation thereto.¹⁰⁵ It may enact legislation to emit bills of credit; to make them receivable in the payment of debts to the government; it may provide for their use in commerce and for their redemption.¹⁰⁶ Under these powers, Congress has established mints and assay offices; has determined what denominations of money shall be issued; and has enacted a law making coins, treasury notes and other currency legal tender in the payment of debts.¹⁰⁷ In 1933, it went so far as to abrogate the gold clause in all private contracts.¹⁰⁸

In order to protect the power of the Federal government to coin money, Congress was given the correlative power to enact laws punishing counterfeiting. Congress has not made this power exclusive and, until it does, the states may also enact laws for the same purpose.¹⁰⁹ The provision extends to the passing of counterfeit coins and securities as well as counterfeiting them.¹¹⁰

The Constitution denied the states the power to coin money or to emit bills of credit. This provision was inspired by the unrestrained issues of paper money by the colonial and state governments, which were based alone upon credit, and the prohibition was limited to the particular forms or evidences of debt that had been so abused to the detriment of both public and private interests.¹¹¹ "To emit bills of credit" means the issuing of paper, redeemable at a future day and intended to circulate through the community as money.¹¹² This provision does not prevent a state from issuing bonds,¹¹³ treasury certificates and treasury notes,¹¹⁴ warrants¹¹⁵ and other evidences of debt not intended to circulate as money.¹¹⁶ It does not prevent the states from issuing tokens in the administration of their taxing powers.¹¹⁷

¹⁰⁵ Civil Rights Cases, 109 U. S. 18, 27 L. ed. 835.

¹⁰⁶ *Veazie Bank v. Fenno*, 8 Wall. 542, 19 L. ed. 482.

¹⁰⁷ *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204.

¹⁰⁸ *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 83 L. ed. 1266; *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240, 79 L. ed. 885, 95 A. L. R. 1352. See also *Smyth v. United States*, 302 U. S. 329, 82 L. ed. 294, 114 A. L. R. 807.

¹⁰⁹ *Dashing v. State*, 78 Ind. 358.

¹¹⁰ *Ex parte Houghton*, 8 Fed. 897.

¹¹¹ *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673.

¹¹² *Craig v. Missouri*, 4 Pet. 431, 7 L. ed. 903.

¹¹³ *Woodruff v. Trapnall*, 10 How. 205, 13 L. ed. 383.

¹¹⁴ *Ramsey v. Cox*, 28 Ark. 367; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673.

¹¹⁵ *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673.

¹¹⁶ *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

¹¹⁷ *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016.

§ 198. **Naturalization.** Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native-born citizen.¹¹⁸ It is the process through which an individual becomes a citizen of the United States. Congress was given this power by the provision:

“To establish a uniform rule of naturalization.” ¹¹⁹

Naturalization may be accomplished in four different ways: (a) By the grant of a special privilege to an individual or a group of individuals;¹²⁰ (b) through collective naturalization upon admission of a territory to statehood;¹²¹ (c) upon United States acquiring territory formerly belonging to a foreign power;¹²² and (d) under general laws providing that any person, who is eligible to naturalization, and who complies with the legal requirements, may be admitted.¹²³ The processes defined in subdivisions (a), (b) and (c) are political in nature, and are accomplished directly through an Act of Congress. Individual naturalization is a judicial process, and is accomplished through the Federal and state courts.¹²⁴

The rules and procedure for individual naturalization have been codified in the Nationality Act of 1940. In addition to conferring jurisdiction upon both Federal and state courts, the act provided: (a) The right of naturalization extends only to white persons, persons of African nativity or descent and to descendants of races indigenous to the Western Hemisphere, to Filipinos having honorable service in the United States military forces, and to former citizens of the United States. This provision excludes a member of the yellow race, such as a citizen of Japan, from becoming a citizen of the United States;¹²⁵ (b) Naturalization may not be granted to any person, who does not speak the English language; (c) Naturalization cannot be granted to any person who believes

¹¹⁸ *Boyd v. Nebraska*, 143 U. S. 162, 36 L. ed. 103.

¹¹⁹ Const. Art. I, § 8, cl. 4.

¹²⁰ See *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643. See 8 USC 368b (act conferring naturalization on women of Hawaii). See also provisions of Nationality Act of 1940, 8 USC 731 et seq.

¹²¹ *Osterman v. Baldwin*, 6 Wall. 116, 18 L. ed. 730.

¹²² *Boyd v. Nebraska*, 143 U. S. 162, 36 L. ed. 103; Re Opinion of Justices, 68 Me. 589.

¹²³ *Chirac v. Chirac*, 2 Wheat. 259, 4 L. ed. 234.

¹²⁴ *Spratt v. Spratt*, 4 Pet. 406, 7 L. ed. 899; Ex parte Knowles, 5 Cal. 302.

¹²⁵ *Ozawa v. United States*, 260 U. S. 178, 67 L. ed. 199.

in or teaches the overthrow of the government of the United States or who believes in the duty or necessity of unlawfully assaulting or killing the officers because of their official character, or who believes in sabotage or who writes or publishes anarchistic doctrines or who aids such persons or organizations through membership or by loaning them money or property; (d) Naturalization may not be granted to deserters from the military or naval forces of the United States, or to any person convicted of avoiding the draft laws; (e) To be eligible for naturalization, a person must have had five years continuous residence in the United States, but the spouse of a person naturalized after May 24, 1934 may secure naturalization upon three years continuous residence and without filing a declaration of intention; (f) A child born outside of the United States of alien parents becomes a citizen of the United States upon the naturalization of both parents, or the naturalization of the surviving parent if one parent is deceased, provided that in all these cases the naturalization is effected while such child is under eighteen years of age; (g) Former citizens may be naturalized upon complying with the provisions of the code governing their status; (h) A person, who lost his citizenship through military or naval service with an enemy country in World War I or World War II may be naturalized upon taking the oath of allegiance; (i) An alien who owes allegiance to a country with which the United States is at war cannot be naturalized unless his petition shall have been filed at least two years prior to the beginning of the war, or unless specially excepted from the provisions of the Act by the President of the United States. A person who claims to have derived citizenship through the naturalization of a parent, or through the naturalization of a husband, or through being born of a citizen or citizens without the United States, may, upon application and proof to a Commissioner of Immigration and Naturalization, secure a certificate of citizenship.¹²⁶

A naturalized person becomes a member of society, possessing all the rights of a natural citizen, and standing, in the view of the Constitution, on the footing of a native, except that he is not eligible at any time to the office of President of the United States, and is not eligible to become a member of Congress until he has been a citizen for seven years.¹²⁷

¹²⁶ Nationality Act of 1940 and amendment approved April 2, 1942, Chap. III, §§ 301-327, 8 USC 705,

726, 801-801g.

¹²⁷ *Osborn v. United States Bank*, 9 Wheat. 827, 6 L. ed. 204.

Naturalization is a privilege and may be given, qualified or withheld as Congress may determine. An alien may claim it as a right only on compliance with the terms which Congress may impose.

Once granted, citizenship is irrevocable except that a certificate of naturalization may be cancelled for fraud or that it was illegally procured, but to secure such a cancellation the evidence must be clear, unequivocal and convincing. It must go beyond a bare presumption. Fraud may consist of deceit and misrepresentation in securing the certificate of naturalization and, under the code, it is considered to exist because of lack of intention to reside permanently in the United States, when a person within five years after receiving his naturalization returns to the country of his nativity, or goes to any other foreign country and takes up his residence.¹²⁹

§ 199. Bankruptcy. The Constitution granted Congress the power to establish a uniform system of bankruptcy in the provision:

"Congress shall have power to establish . . . uniform laws on the subject of bankruptcies throughout the United States."¹³⁰

The object of such a system was to secure a ratable distribution of the bankrupt's estate among his creditors, when he was unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon surrender of his property.¹³¹

Under this authority Congress has enacted a national bankruptcy law. This law is uniform throughout the United States.¹³² A state has no authority to pass any law or regulation that will interfere or supplement this act, since the Federal bankruptcy

¹²⁹ *Luria v. United States*, 231 U. S. 9, 58 L. ed. 101; *United States v. Mansour*, 170 Fed. 671; *Schneiderman v. United States*, 320 U. S. 118, 87 L. ed. 1796; *Baumgartner v. United States*, 322 U. S. 665, 88 L. ed. 1525; *United States v. Mansour*, 56 Fed. 556; *Nationality*

Act of 1940, § 338, 8 USC 738, 746.

¹³⁰ Const. Art. I, § 8, cl. 4.

¹³¹ *United States v. Fox*, 95 U. S. 672, 24 L. ed. 538.

¹³² 11 USC 1 et seq.; *Hanover Nat. Bank v. Moyses*, 186 U. S. 188, 46 L. ed. 1113.

power is paramount and supreme. Congress may recognize and enforce the laws of the state affecting dower, exemptions, the validity of mortgages, priorities of payments and similar laws, and a state may legislate upon the subject of fraudulent transfers, provided that the legislation does not conflict with the Bankruptcy Act. Congress, however, has enacted a law, providing that whenever any person indebted to the United States shall become insolvent, the debts due the United States shall be first satisfied, and this enactment is superior to any state statute.¹³³

In the exercise of its bankruptcy powers, Congress may impair the obligation of contracts, and extend the provisions of the bankruptcy laws to contracts existing at the time of the enactment of the law. This is permitted since the provision of the Constitution, with reference to the impairment of contracts is a limitation only upon the states. There is no such limitation upon the national government. All parties to a contract, therefore, are subject to the power of Congress to legislate upon this subject.¹³⁴

Under this provision Congress has the power to provide for compositions of creditors, extensions and corporate reorganizations. In 1935 it enacted a law known as the Frazier-Lemke Act to aid embarrassed farmers. This law provided for a three-year stay of foreclosure proceedings and for certain readjustment of the debt.¹³⁵ Congress has also provided for railroad reorganizations;¹³⁶ for debt readjustments by municipalities and taxing districts, but the Supreme Court held this section of the law unconstitutional;¹³⁷ for corporate reorganizations, but such reorgan-

¹³³ *Marine Harbor Properties, Inc. v. Manufacturers Trust Co.*, 317 U. S. 78, 87 L. ed. 64; *Hanover Nat. Bank v. Moyses*, 186 U. S. 188, 46 L. ed. 1113; *New Lamp Chimney Co. v. Ansonia Brass Co.*, 91 U. S. 661, 23 L. ed. 336; *Stellwagen v. Clum*, 245 U. S. 605, 62 L. ed. 507; *International Shoe Co. v. Pinkus*, 278 U. S. 261, 73 L. ed. 318; *United States v. Emory*, 314 U. S. 423, 86 L. ed. 315; *United States v. Texas*, 314 U. S. 480, 86 L. ed. 356.

¹³⁴ *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113; In

re *Prima Co. (C. C. A.)* 88 F. (2d) 785, 116 A. L. R. 766; In re *Cope*, 8 F. Supp. 778.

¹³⁵ 11 USC 203; *Wright v. Mountain Trust Bank*, 300 U. S. 440, 81 L. ed. 736. See also *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 97 A. L. R. 1106 and *Wright v. Vinton Mountain Trust Bank*, 300 U. S. 440, 81 L. ed. 736.

¹³⁶ 11 USC 205.

¹³⁷ 11 USC 303; *United States v. Bekins*, 304 U. S. 27, 82 L. ed. 1137; *Ashton v. Cameron County Water Improvement Dist. No. 1*,

izations must be in good faith and not for the purpose of the liquidation of the affairs of the corporation;¹³⁸ for arrangements for the adjustment of unsecured obligations;¹³⁹ for an adjustment of debts secured by real estate bonds or mortgages, or chattels real;¹⁴⁰ and for a plan to relieve wage earners from the harassment of garnishment and attachment proceedings.¹⁴¹

The Federal courts have exclusive jurisdiction of bankruptcy proceedings. Original jurisdiction is vested in the District Court of the United States, and usually the proceedings are referred to an officer known as the referee in bankruptcy.¹⁴²

§ 200. Standards of Weights and Measures. The Constitution gave Congress the power to fix the standard of weights and measures. The purpose of the grant was to secure uniformity in the relation of trade and commerce among the states.¹⁴³

The Constitution has not expressly denied this power to the states. In the absence, therefore, of congressional legislation the states may exercise the power. It is not the mere grant of power to Congress, but its exercise of the power, which makes its action exclusive. For example, a state law establishing daylight savings time was held not to be inconsistent with the Federal statute fixing standard time.¹⁴⁴

§ 201. Postal System. Congress has been given power to establish and operate our postal system under authority granted in the provision:

“To establish post offices and post roads.”¹⁴⁵

The power is complete and plenary. Congress is vested with exclusive control over the entire postal system of the nation with all its incidents and accessories and with all the authority that is

298 U. S. 513, 80 L. ed. 1309. (“A state . . . may permit actions against her political subdivisions to enforce their obligations,” the Court said, “but nothing in this tends to support the view that the Federal Government, acting under the bankruptcy clause, may impose its will and impair state powers . . . pass laws inconsistent with the idea of sovereignty.”)

¹³⁸ 11 USC 207; *Fidelity Assurance Ass'n v. Sims*, 318 U. S. 608, 87 L. ed. 1032.

¹³⁹ 11 USC 501 et seq., 701 et seq., 801 et seq.

¹⁴⁰ 11 USC 801 et seq.

¹⁴¹ 11 USC 501 et seq., 701 et seq.

¹⁴² 11 USC 41-52.

¹⁴³ Const. Art. I, § 8, cl. 5.

¹⁴⁴ *Massachusetts State Grange v. Benton*, 272 U. S. 525, 71 L. ed. 387; *Dwight & Lloyd Sintering Co. v. American Ore Reclamation Co.* (C.C.A.) 263 Fed. 315.

¹⁴⁵ Const. Art. I, § 8, cl. 7.

necessary to make its power fully effective. This authority includes the designation of routes over which mail shall be carried and the offices and points where letters and other mail shall be received. It also includes the transportation of the mails, and all measures which are necessary to secure its safe and speedy transit, as well as its prompt delivery.¹⁴⁶

Since the power of Congress embraces the regulation of the entire postal system, it has the power to enact laws defining what is mailable matter and what is not, and to exclude the nonmailable. It has thus prohibited the distribution of lottery tickets, and of obscene, indecent and seditious literature. It has forbidden the use of mails to defraud. In this way it has controlled the circulation of undesirable newspapers and periodicals.¹⁴⁷

The power of Congress may be exercised to prevent the use of the mails to accomplish ends inimical to public policy or to the general welfare.¹⁴⁸ It may, therefore, refuse the use of the mails to persons conducting an unlawful interstate enterprise.¹⁴⁹ The power, however, is subject to the limitations of the Fifth Amendment.¹⁵⁰

Congress has protected the mails by enacting statutes making interference with them a crime, and by enjoining and punishing strikers and others interfering with their transportation or delivery. It has also made it a criminal offense for any person to open a letter after it has passed from the control of post office officials and before its manual delivery to the addressee.¹⁵¹

§ 202. Copyrights and Patents. The Constitution contains the following provision relating to the power of Congress to grant copyrights and patents:

“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁵²

¹⁴⁶ *In re Rapier*, 143 U. S. 132, 36 L. ed. 93; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.

¹⁴⁷ *Public Clearing House v. Coyne*, 194 U. S. 511, 48 L. ed. 1092; *Badders v. United States*, 240 U. S. 391, 60 L. ed. 706; *Lottory Case*, 188 U. S. 321, 47 L. ed. 492.

¹⁴⁸ *Electric Bond & Share Co. v. Securities & Exchange Commission*

(C. C. A.) 92 F. (2d) 580.

¹⁴⁹ *Securities & Exchange Commission v. Crude Oil Corp.* (C.C.A.) 93 F. (2d) 844.

¹⁵⁰ *In re American States Public Service Co.*, 12 F. Supp. 667.

¹⁵¹ *In re Debs*, 158 U. S. 564, 39 L. ed. 1092; *United States v. McCready*, 11 Fed. 225.

¹⁵² Const. Art. I, § 8, cl. 8.

The purpose of this clause is to give to authors and inventors the exclusive right to their respective writings and discoveries for such period as Congress shall fix in order to promote science and the useful arts. The right is purely statutory and depends wholly on the legislation of Congress. No right to either copyright or patent existed at common law. The right cannot be restricted by state legislation.¹⁵³

A copyright is the exclusive right to reproduce by writing, printing, or otherwise and to publish and sell the matter and form of a literary or artistic work or writings. The terms, work and writings, include prints, charts, maps, drawings, paintings, photographs, as well as books and other printed matter. The first copyright law was enacted in 1790. The present law dates from 1909 and fixes the term of a copyright at 28 years, with the privilege of renewal for another 28 years upon the filing of an application.¹⁵⁴

Letters patent confer upon the patentee an exclusive property in the patented invention, which cannot be appropriated or used by any other person, not by even the government itself, unless, of course, the right is acquired with the consent of the owner or through eminent domain proceedings. Beyond this limited monopoly the arrangements by which a patent is utilized is subject to the general law. The sale of a patented article exhausts the monopoly of the patentee, and he cannot thereafter control the use, disposition or resale of the article.¹⁵⁵ An invention to be patentable must be new and useful, and the period for which it is patentable is 17 years. A patent is obtained through a course of proceeding quasi-judicial in character.¹⁵⁶

§ 203. Punish Piracies and Felonies. Congress is vested with the power to define and punish piracies and felonies as set forth in the following grant:

“To define and punish piracies and felonies on the high seas, and offenses against the Law of Nations.”¹⁵⁷

¹⁵³ *Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425.

¹⁵⁴ 17 USC 1 et seq.; *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed. 327; *Fisher Music Co. v. Witmark & Sons*, 318 U. S. 643, 87 L. ed. 1055 (history of copyright legislation).

¹⁵⁵ *United States v. Univis Lens Co.*, 316 U. S. 241, 86 L. ed. 1408;

United States v. Masonite Corp., 316 U. S. 265, 86 L. ed. 1461.

¹⁵⁶ 35 USC 1 et seq.; *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. ed. 450.

¹⁵⁷ Const. Art. I, § 8, cl. 10.

Since this clause relates to foreign and external affairs, the power granted here is confirmatory of the inherent power of Congress over external sovereignty.¹⁵⁸

This clause supplements the clause extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." The term "piracies" as used here is the same as the crime of piracy defined by the law of nations.¹⁵⁹ The term high seas includes waters within bays and roadsteads, even though within the jurisdiction of another power. It is applicable to the open, undiscovered waters of the Great Lakes.¹⁶⁰

Congress has the power to punish offenses against the law of nations. Every national government must use reasonable diligence to prevent wrong or injury being done to another nation with which it is at peace, or to the people of such nation. By reason of this obligation it must have the right to punish any person committing an offense against such a nation. For example, in 1887 a person was legally punished for counterfeiting the money of another nation.¹⁶¹

§ 204. War Powers. The war powers of Congress may be classified as follows: (a) inherent powers; and (b) granted powers.

The inherent powers are those which Congress possesses by reason of the fact that the United States is a sovereign nation. These powers have been discussed in section 188 of this chapter.¹⁶²

The granted powers are those conferred on Congress by Section 8 of Article I. of the Constitution of 1787. The provisions are as follows:

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces.

"To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."

¹⁵⁸ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

¹⁵⁹ United States v. Smith, 5 Wheat. 153, 5 L. ed. 57.

¹⁶⁰ United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071.

¹⁶¹ United States v. Arjona, 120 U. S. 479, 30 L. ed. 728; United States v. Flores, 289 U. S. 137, 77 L. ed. 1086.

¹⁶² See also United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

Section 10 of Article I. places the following prohibitions upon the states:

"No state shall grant letters of marque and reprisal."

"No state shall, without the consent of Congress, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

These constitutional provisions have been supplemented by Acts of Congress of which the most important have been enumerated in section 45 of Chapter 6.

Under its inherent powers and the authority granted by the provisions of the Constitution of 1787, Congress has the following powers:

(a) To declare war. This power rests exclusively with Congress. The President, being in charge of our foreign relations, may create international situations amounting to war, but the formal declaration must be made by Congress. The President is the Commander-in-Chief of the Army, Navy, and Air Forces.¹⁶³

(b) To enact all legislation necessary to the prosecution of the war with vigor and success.¹⁶⁴ To this end Congress may use its powers to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of these forces; and to provide for organizing, arming and disciplining and calling forth the militia. These powers are exclusive in Congress.¹⁶⁵

Speaking of these powers, Justice Sutherland in 1930 asserted: "In express terms Congress is empowered to declare war, which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and to raise armies, which necessarily connotes the like power to say who shall serve in them and in what way. From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles

¹⁶³ Prize Cases, 2 Black 635, 17 L. ed. 459.

¹⁶⁴ United States v. Macintosh, 283 U. S. 605, 75 L. ed. 1302.

¹⁶⁵ Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Selective Service Cases, 245 U. S. 366, 62 L. ed. 349;

Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 64 L. ed. 194; Dupont Powder Co. v. Davis, 264 U. S. 456, 68 L. ed. 788; Stoehr v. Wallace, 255 U. S. 239, 65 L. ed. 604.

of international law. In the words of John Adams, 'this power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.'

"To the end that war may not result in defeat, freedom of speech may, by Act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed and regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war. These are but illustrations of the breadth of the power."¹⁶⁶

In World War I Congress under this authority enacted a selective service act, an espionage act, an alien enemy act, War Risk Insurance Act, and an act creating a United States Shipping Board. Under these powers the National Government controlled our great transportation systems, our telegraph and our cable lines, and enforced national prohibition during the period of the war and during demobilization thereafter. Under them President Wilson conscripted an army and transported it to European and Asiatic Countries.¹⁶⁷

¹⁶⁶ United States v. Macintosh, 283 U. S. 605, 75 L. ed. 1302; Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 73 L. ed. 688; Hirabayashi v. United States, 320 U. S. 81, 87 L. ed. 1774.

¹⁶⁷ Former President Hoover has given us a vivid picture of the use of these powers. "After a few weeks of muddling and resisting," he said, "we accepted the inexorable fact that no democracy can fight a modern war with the processes of democracy. They are made for peace. They are too slow in action;

there is no time for debate and the meeting of minds. We became an effective dictatorship. We had to do it if we were to bring quick strength upon the front. We conscripted all our boys. By direct and indirect means, the government took control of production, of prices, of labor. It rightly seized about 85% of war profits. The government took over the railways. It directed credit, and by direct and indirect means it partially suppressed free speech and free press. It told the people what to eat and wear. If

In World War II. Congress exercised even greater powers. Many of the enactments of World War I. were still in force. To these Congress added other laws. It enacted more comprehensive selective training and service acts, requiring the registration of all male persons between the ages of eighteen and sixty-five years, and making all persons between the ages of eighteen and forty-five subject to training and service in the land and naval forces of the United States. The Supreme Court, in 1942, extended this authority by holding that Congress had the power to draft business organizations, Justice Black observing, "The Constitution grants Congress the power to raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less."

Congress enacted the National Service Life Insurance Act for the protection of any person in the active military, naval and air forces. It enacted two War Powers Acts to meet emergencies which had arisen in this war. It enacted a soldiers' and sailors' Civil Relief Act and an emergency Price Control Act. It also enacted laws providing for creating priorities of strategic articles needed for war purposes; for stabilizing prices and wages; for rationing rubber, food, oil, gasoline and other necessities; and generally regimenting the life of the people in a manner unprecedented in the history of the nation.¹⁶⁸

that war had been a long war, its economic demobilization would have been more difficult. But even as it was had it not been for a great believer in free enterprise, Woodrow Wilson, we would not have been demobilized." (Saturday Evening Post, Oct. 28, 1939.) See also *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 63 L. ed. 910; *American Nat. Bank v. Service Life Ins. Co.*, 120 F. (2d) 579, 137 A. L. R. 1148, 1155; *United States ex rel. Bergdoll v. Drum*, 107 F. (2d) 897, 129 A. L. R. 1165, 1171.

¹⁶⁸ 50 USC 302-305; *O'Neal v. United States*, 140 F. (2d) 908, 151

A. L. R. 1474 (since Congress may invest the President with power of allocation under the second war powers act, it follows that it may also give him the authority to delegate these powers to other administrative boards and officials such as the Office of Price Administration); *Bowles v. Washington County*, 58 F. Supp. 709; *Brooks v. United States*, 147 F. (2d) 134; *Walter Brown & Sons v. Bowles*, 58 F. Supp. 323; *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 86 L. ed. 855 (draft business organizations); 50 USC 301-318; Public Law 507, 77th Cong.; 50 USC 301-315, 510-581, 901-986.

Under the power granted to make rules for the government of the land and naval forces, Congress has enacted codes of regulations for the Army, Naval, and Air Forces. These rules and regulations have the force of law. They provide for the trial and punishment of military, naval, and air offenses in the manner practiced by civilized nations, and this power is independent of the judicial power of the United States under Article III of the Constitution. The acts of a court-martial, within the scope of its jurisdiction and duty, cannot be reviewed by the civil courts, but that does not preclude access to the courts for the determination of the jurisdiction of the military tribunal over the particular case.¹⁶⁹

The militia, which is popularly known as the National Guard, when not called into the service of the United States is a state organization.¹⁷⁰ While Congress shall prescribe the rules for a general military system the details of the militia organization and its management is left to the states. When the militia has entered the service of the United States, the authority of the national government is exclusive.¹⁷¹

The military power of Congress extends to the preparation for war in time of peace. It may raise and maintain an army, and for this purpose may enact a conscription law. Such a law was enacted in September, 1940.¹⁷² It may build naval vessels and airplanes. It may build forts, arsenals and air bases, and acquire territory for all military purposes.¹⁷³ It may improve navigation. This power enabled it to build the Panama Canal. In the exercise of its war and its commerce powers, it has built huge power projects on the Tennessee, Colorado, and Columbia Rivers in widely separated sections of the nation. In many other cases through the exercise of one or both of these powers it has greatly increased its control over economic conditions.¹⁷⁴

¹⁶⁹ *United States v. Oglesby Grocery Co.*, 264 Fed. 691; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838; *Mullan v. United States*, 212 U. S. 516, 53 L. ed. 632; *Ex parte Richard Quirin*, 317 U. S. 1, 87 L. ed. 3.

¹⁷⁰ *State v. Johnson*, 186 Wis. 1, 202 N. W. 191.

¹⁷¹ *Houston v. Moore*, 5 Wheat. 16, 5 L. ed. 19.

¹⁷² Selective Service and Train-

ing Act of 1940, 50 USC 301-318; *United States v. Cornell*, 36 F. Supp. 81.

¹⁷³ *United States v. Burlington & Henderson County Ferry Co.*, 21 Fed. 331.

¹⁷⁴ *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. ed. 543.

There are few limitations upon these powers, either in war time or in peace time. Among the recognized checks are the following: (a) Belief in the principles of free enterprise. The demobilization of the armies at the conclusions of World War I and World War II was accomplished by Presidents Wilson and Truman due to their belief in this principle, and the people have a right to expect all subsequent Presidents to follow the same course. (b) Upon Congress rests the power to vote or to refuse to vote funds, and under this power no appropriation can be valid for more than two years. (c) Congress has the power to limit the time in which laws granting extraordinary powers to the President shall operate. Frequently it has limited the operation of these laws to the period of the war or other emergency or to a fixed date thereafter. (d) Public opinion expressed by the electorate at the polls, or by the people through pressure groups, and through the press, the radio, or other avenues of public expression.¹⁷⁵

§ 205. Expenditure of Public Money. The Constitution protected the expenditure of the public funds. It provided:

“No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”¹⁷⁶

Congress is in absolute control of all of the moneys of the United States and it is responsible solely to the people for the exercise of this great power. This clause is not a restriction upon Congress, but upon the executive officers of the Treasury Department. Congress, as the law making power, has authority to involve the government in liabilities to pay out money to any extent. When such contracts are made, the persons or parties, who acquire rights to compensation, must await action by Congress before they can receive it, even though they may have a judgment in the Court of Claims or other Federal Court. When the President is authorized by the Constitution or an Act of Congress to do a thing or perform a service, requiring the expenditure of public funds, he may proceed independent of whether there are adequate funds appropriated, and the cost of the thing becomes a lawful charge on the government.¹⁷⁷

¹⁷⁵ See note 167, *supra*.

¹⁷⁶ Const. Art. I, § 9, cl. 7.

¹⁷⁷ *Knote v. United States*, 95 U. S. 149, 24 L. ed. 442; *Reeside v. Walker*, 11 How. 272, 13 L. ed.

693; *United States v. Langston*, 118 U. S. 389, 30 L. ed. 164; *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 81 L. ed. 1122; 6 Op. Atty. Gen. 28.

Under this provision, the President annually submits to Congress a budget of expenditures. There is nothing in the law, however, to prevent Congress from appropriating greater or lesser sums.

§ 206. Titles, Gifts from Foreign States. The Constitution forbade the granting of titles of nobility, or the acceptance of titles, gifts or favors from foreign states. It provided:

“No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept any present, emolument, office or title, of any kind whatever, from any king, prince or foreign state.”¹⁷⁸

Under this clause, Congress is without power to grant any title of nobility, and no officer of the United States, without the consent of Congress, is permitted to accept any present, emolument, office or title from any king, prince or foreign state. This prohibition is so comprehensive that it includes photographs and other simple remembrances. A minister of the United States, however, may render a friendly service to a foreign power, such as negotiating a treaty for it, but he cannot become an officer of that power or in any way its accredited representative.¹⁷⁹

§ 207. Impeachment. The power to try impeachments and the judgment to be rendered were defined as follows:

“The House of Representatives shall have the sole power of impeachment.”¹⁸⁰

“The Senate shall have the sole power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”¹⁸¹

In construing these provisions the courts have held:

- (a) That the proceedings are judicial in character.
- (b) That both the House of Representatives and the Senate have the power to compel the attendance of witnesses and

¹⁷⁸ Const. Art. I, § 9, cl. 8.

¹⁷⁹ 13 Op. Atty. Gen. 538.

¹⁸⁰ Const. Art. I, § 2, cl. 5.

¹⁸¹ Const. Art. I, § 3, cls. 6, 7.

to require them to answer proper questions in the same manner and by the use of the same means as used by courts of justice in like cases.

- (c) That the guilt of the accused must be established beyond a reasonable doubt.
- (d) That the accused, upon conviction, cannot be pardoned.¹⁸²

The officers of the United States subject to impeachment were discussed in connection with the powers and duties of the executive department in section 129 of Chapter 12.

§ 208. Police Power. This is an inherent power. It is an essential element of government. It is an attribute of sovereignty that is possessed by every civilized nation. It may be defined as the inherent authority of the government to prescribe regulations to promote the comfort, safety and welfare of society; to adopt rules to promote the health, morals, education and good order of the people; and to legislate so as to increase the resources of the state or nation or to add to its wealth and prosperity.¹⁸³

While the police power was reserved to the states by the Tenth Amendment, the Federal government exerts powers with the same incidents in the sphere of its activity. "That the United States lacks the police power, and that it was reserved to the states by the 10th Amendment is true," admitted Justice Brandeis. "But it is none the less true," he asserted, "that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish the same purpose."¹⁸⁴ "It is equally well settled," runs another Federal case, "that as to internal affairs the states retained their police power, which they . . . possessed prior to the adoption of the national constitution, and no such powers were granted to the nation. . . . But it is equally well settled that the United

¹⁸² *United States v. Harris*, 26 Fed. Cas. No. 15312; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; Const. Art. II, § 2, cl. 1.

¹⁸³ *Miller v. Board of Public Works*, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479; *Nebbia v. New*

York, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.

¹⁸⁴ *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 64 L. ed. 194; *Oklahoma City v. Sanders*, 94 F. (2d) 323, 115 A. L. R. 363.

States does possess what is analogous to the police power, which every sovereign nation possesses . . . to carry into effect those powers which the Constitution has conferred upon it."¹⁸⁵ The United States exercises police powers in the District of Columbia identical with the police powers exercised by the states.¹⁸⁶

It may be said, therefore, that the doctrine is established that the Federal government possesses a police power, which it exercises within the sphere of its activity, similar to the police powers of the states which they exercise within the sphere of their governmental activities. The only practical difference between the powers of the two governments is the field of their activities, the Federal government being limited by the powers granted to it, and the field of the state governments being restricted to the undefined powers reserved to the internal sovereignty of the states.

The following laws are examples of enactments adopted by Congress under its commerce, taxing, postal and other powers, but which are in the nature of police powers. (a) The adoption of war-time prohibition.¹⁸⁷ (b) The White Slave law, designed to prevent women being transported from one state to another for immoral purposes.¹⁸⁸ (c) Lindbergh Act defining the offense and punishment of kidnapping.¹⁸⁹ (d) National Motor Vehicles Theft Act, defining offenses and prescribing punishment for the interstate transportation of stolen motor vehicles.¹⁹⁰ (e) Federal Food, Drug and Cosmetic Act, which established power to ban from interstate commerce any food, drug, device or cosmetic that is adulterated or misbranded.¹⁹¹ (f) Sundry enactments by Congress such as quarantine laws; anti-trust acts; lottery acts; anti-racketeering Act; Safety Appliance Act; and other laws of a similar nature enacted by Congress under powers granted by the Constitution.¹⁹²

¹⁸⁵ United States v. Shauver, 214 Fed. 154. See also Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 73 L. ed. 688; Trinity Methodist Church v. Federal Radio Commission, 62 F. (2d) 850.

¹⁸⁶ Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 16 A. L. R. 165.

¹⁸⁷ Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260.

¹⁸⁸ Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, Ann. Cas.

1913 E 905.

¹⁸⁹ 18 USC 408a-408c.

¹⁹⁰ 18 USC 408.

¹⁹¹ 21 USC 1 et seq. and 301 et seq.

¹⁹² Frisbie v. United States, 157 U. S. 165, 39 L. ed. 657; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893; Nick v. United States, 122 F. (2d) 660, 138 A. L. R. 791.

CHAPTER 18

POWER OF CONGRESS TO REGULATE COMMERCE

“Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.”

—Justice Holmes

§ 209. **Constitutional Provision—Acts of Congress.** The Constitution vested in Congress the power to regulate interstate and foreign commerce in a brief but far-reaching provision which reads:

“To regulate commerce with foreign nations and among the several states and with the Indian tribes.”¹

This clause of the Constitution has been implemented by a score or more of major statutes, which have defined and applied the power of regulation to transactions constituting interstate commerce such as the interstate commerce acts, the acts prohibiting unlawful restraints, monopolies and trusts, as well as other acts of Congress.²

(A) *Interstate Commerce Acts.* The original interstate commerce act was adopted in 1887, and since then there have been several amendatory acts including the act of 1940, known as the Transportation Act.³

The purpose of these acts was to provide for fair and impartial regulation of all modes of travel; to recognize and preserve the inherent advantages of each of these modes; to promote safe, adequate, economical and efficient service, and to foster sound conditions in transportation among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair wages and equitable working conditions. These acts apply to railroads, motor carriers, merchant

¹ Const. Art. I, § 8, cl. 3.

clause, see Chap. 6, § 48, supra.

² For general discussion of statutes implementing the commerce

³ 49 USC 1-41.

vessels and all other interstate transportation, except air commerce and communications by wire which are governed by special acts.⁴

(B) *Acts Prohibiting Unlawful Restraints, Monopolies and Trusts.* These acts include the following: The Sherman Anti-Trust Law, enacted in 1890, made illegal all contracts, combinations and conspiracies in restraint of trade and commerce.⁵ The Clayton Act of 1914 prohibited leases or sales in interstate commerce when they were made on the condition that the lessee or purchaser should not use or deal in the goods of competitors.⁶ The Federal Trade Commission Act of 1914 declared unlawful unfair methods of competition in commerce. The Packers and Stockyards Act of 1921 sought to regulate the business of the packers and forbade them to engage in unfair and discriminatory or deceptive practices in interstate commerce. The United States Cotton Futures Act of 1916 regulated and restricted sales of cotton for future delivery.⁷ The Grain Futures Act of 1922 imposed regulations on grain boards of trade,⁸ and the Federal Trade Commission Act of 1938 was adopted for the purpose of preventing unfair methods of competition in commerce and trade.⁹ The purpose of these acts, as well as others,¹⁰ was to secure the free flow of commerce among the states and to preserve inviolate the liberty of the trader to engage in business unobstructed by any combinations, contracts and monopolies.¹¹

(C) *Other Acts of Congress.* Among other leading acts of Congress implementing this clause are the Motor Carrier Act; Air Commerce Act and Civil Aeronautics Act; Federal Communications Act; Radio Act; Securities Act; Securities Exchange Act; Federal Power Act; National Labor Relations Act; Federal Trade Commission Act; Commodity Exchange Act; Bituminous Coal Conservation Act; United States Tariff Commission Act; Federal Food,

⁴ Transportation Act of 1940, § 1. See also Interstate Commerce Commission v. Baltimore R. Co., 145 U. S. 265, 36 L. ed. 699.

⁵ 15 USC 1-7.

⁶ 15 USC 12-27, 41-58; 18 USC 412; 28 USC 381-383, 386-390.

⁷ 26 USC 1090-1106, 1699; *Stafford v. Wallace*, 258 U. S. 495, 66 L. ed. 735.

⁸ 7 USC 1-17.

⁹ 15 USC 41-51; 7 USC 610.

¹⁰ Other acts of this class were

the act to promote export trade enacted in 1918 (15 USC 61-65; also 49 USC 11); Packers and Stockyards Act of 1921 (7 USC 181-183, 191-195, 201-217, 221-229); and Wire and Radio Communications Act adopted in 1934, and amended in 1937 (47 USC 151 et seq.).

¹¹ 47 USC 151; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290.

Drug, and Cosmetic Act, and Federal Highway Act. These acts will be discussed in more detail in later sections.¹²

§ 210. **Gibbons v. Ogden.** The commerce clause has been extended and enlarged, also, through construction and interpretation by the Supreme Court of the United States. The first great decision was announced in 1824 in the case of *Gibbons v. Ogden*. In this opinion, Chief Justice Marshall laid the firm foundations upon which the law of interstate and foreign commerce has been developed. Later decisions have done little more than elaborate and apply the principles enunciated by him.

This case involved a statute enacted by the legislature of the State of New York granting Robert Livingston and Robert Fulton exclusive right to navigate the waters of the state for a period of years, and this right passed to one Ogden by assignment. Gibbons had two boats enrolled and licensed under the Act of Congress of 1793, and was operating them between points in New Jersey and the city of New York. Ogden sought an injunction to restrain Gibbons from operating his steamboats between these points in violation of his exclusive right. The appellate court of New York had affirmed a decree granting Ogden an injunction.

In reversing the New York appellate court Chief Justice Marshall announced the following fundamental principles:

(a) The doctrine of strict construction will not be permitted to deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for the narrow construction would cripple the government, render it unequal to the objects for which it was instituted, and would render it incompetent.

(b) "Commerce," he said, "undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

(c) Commerce includes navigation. It was so understood when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been con-

¹² See §§ 224-231 inclusive, *infra*.

templated and used in that sense by the members of the Constitutional Convention.

(d) The commerce to which the power of regulation applied was "with foreign nations, and among the states and with the Indian tribes." No sort of trade can be carried on between this country and any other to which the power does not extend, and the same is true of commerce among the states. This commerce cannot stop at the external boundary line of each state but may be introduced into the interior. The genius and character of the government seems to be that its action shall be applied to all external concerns of the nation and to those internal concerns which affect the states generally.

(e) The completely internal commerce is reserved to the state itself. The commerce clause of the Constitution was not intended to comprehend that commerce which was completely internal, which was carried on between man and man in a state, or between different parts of the same state, which did not extend to or affect other states, and with which it was not necessary to interfere for the purpose of executing some of the general powers of the government.

(f) What is this power? It is the power to regulate; to prescribe the rules by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

(g) Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those with respect to roads, ferries, etc., form a portion of the immense mass of legislation which embraces everything within the territory of the state not surrendered to the general government. The power to enact these laws can be most advantageously exercised by the states.

(h) The framers of the Constitution foresaw that a law passed by a state in the exercise of its acknowledged sovereignty would come in conflict with an Act of Congress passed in pursuance of the Constitution, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. In every such case the Act of Congress is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

(i) The transportation of passengers is commerce the same as the transportation of goods. On March 2, 1819, Congress passed an act regulating passenger ships and vessels. This wise and humane law provides for the safety and comfort of passengers, and shows conclusively that Congress comprehended that they possessed the same rights as goods and other commerce.¹³

This case is one of the most lasting consequences.¹⁴ Beveridge in his *John Marshall* appraised its importance in the following language: "But few events in our history have had a larger and more substantial effect on the well-being of the American people than this decision, and Marshall's opinion in the announcement of it. No other judicial pronouncement was so interwoven with the economic and social evolution of a nation and a people."¹⁵

The extent to which these principles have been restated in subsequent cases, and how the scope and meaning of this clause have become interwoven with our economic structure in more recent years will appear from succeeding sections.¹⁶

§ 211. Extent of Power. Since the pronouncement of Chief Justice Marshall in *Gibbons v. Ogden*, the power to regulate commerce has been broadly construed by the courts. They have held that this power of Congress is complete in itself. There are no restrictions upon it except the limitations and guarantees which are found in the Constitution and the Amendments.¹⁷ The power extends not only to external commerce, but reaches the interior of the states in so far as it is necessary to protect the products of other states and countries from discrimination.¹⁸ It relates to commerce conducted by corporations, as well as individuals, including such great corporations as interstate railways, navigation lines, air lines, and other corporations engaged in foreign and interstate trade. It includes the power to enjoin and punish strikers and others inter-

¹³ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Western Union Tel. Company v. Lenroot*, 323 U. S. 490, 89 L. ed. 414 (telegrams are goods).

¹⁴ Carson, *The Supreme Court of the United States*, 259.

¹⁵ 4 Beveridge, *Life of John Marshall*, 446.

¹⁶ For a restatement of principles after 87 years of commercial ac-

tivity see *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. ed. 327.

¹⁷ *Hoke v. United States*, 227 U. S. 434, 57 L. ed. 523; *Overnight Motor Transportation Co. v. Messel*, 316 U. S. 572, 86 L. ed. 1682 (commerce power plenary).

¹⁸ *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743.

fering with interstate commerce,¹⁹ and to regulate the employers' liability of interstate carriers. It also includes the power to prohibit from interstate transportation goods made by convict labor and to control the interstate transportation of intoxicating liquors.²⁰

Speaking of the extent of Federal power as provided in the National Industrial Recovery Act of June 16, 1933, Chief Justice Hughes observed: "Our growth and development have called for wide use of the commerce power of the Federal Government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences and conspiracies to restrain and monopolize it. But the authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the states' and the internal concerns of the states."²¹

§ 212. Extent of Control of Intrastate Transactions. The extent of control by the Federal government of intrastate transactions upon the ground that they affect interstate commerce depends, in a large measure, upon the distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects may be illustrated by cases involving the effect of failure to use prescribed safety appliances on railroads; by cases involving injury to an employee engaged in interstate transportation; and by cases involving the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. This distinction may be illustrated further by the application of the Anti-Trust Act. Where a combination or conspiracy is formed with the intent to restrain interstate commerce, or to monopolize any part of it, the effect is direct. But where the intent is absent and

¹⁹ *In re Debs*, 158 U. S. 564, 39 L. ed. 1092.

²⁰ *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. ed. 327; *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U. S. 334, 81 L. ed. 270; Amendment

XXI; *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38.

²¹ *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947.

the objectives are limited to intrastate activities, the effect, if any, upon interstate commerce would be considered indirect.

The Supreme Court has held that the distinction between direct and indirect effects of intrastate transactions must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise there would be virtually no limit to the Federal power, and for all practical purposes we would have a centralized government.²²

The control of the Federal government does not extend to regulations by the states, which are local in character, which do not substantially impair the national interest in the regulation of commerce, and which do not materially obstruct the free flow of commerce, or which may never be adequately dealt with by Congress. Such regulations, the Supreme Court has said, only "affect" commerce rather than "command its operations."²³

§ 213. Limitations Upon Power. The Constitution limited the power of Congress over commerce in the manner set forth in the following provisions:

"No tax or duty shall be laid on articles exported from any state."²⁴

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter clear or pay duties in another."²⁵

The word "export" in the first provision refers only to goods exported to a foreign country. The limitation in the second provision refers only to the states, as distinguished from territories such as the Philippine Islands, Puerto Rico and the Virgin Islands. These islands are said to be appurtenant to the United States, but are not an integral part of the Union.²⁶

The specific limitations contained in this provision relating to "no preference" is intended to prevent a preference between states in respect to their ports or the entry and clearance of vessels. It does not prevent such discrimination between ports.

²² *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947;

Southern Ry. Co. v. United States, 222 U. S. 20, 56 L. ed. 72; *Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341.

²³ *Parker v. Brown*, 317 U. S.

341, 87 L. ed. 315.

²⁴ Const. Art. I, § 9, cl. 5.

²⁵ Const. Art. I, § 9, cl. 6.

²⁶ *Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088.

Congress causes many things to be done that greatly benefit particular ports, which incidentally result in the disadvantage of other ports in the same or neighboring states. The establishing of ports of entry, erection and operation of lighthouses, improvements of rivers and harbors are examples.²⁷

§ 214. What Is Interstate Commerce? Interstate commerce is commerce between or among the states. It includes the transportation of goods and passengers and traffic in intangibles from a point without a state to a point within a state, and from a point within a state to a point without, as well as that commerce which passes entirely through a state. It may also include transportation from one point to another within a state (a) when a part of the route between points is without the state; or (b) when the transportation is by a system engaged in interstate commerce.²⁸

The question of whether or not commerce is interstate must be determined by the essential character of the commerce. Among the common incidents of this commerce are through billing, continuous possession by the carrier, uninterrupted movement, unbroken bulk, and the intention existing at the time the movement starts.

The following cases, although borderline in character, have been held to be interstate commerce: (a) Transportation of oil and gas in pipe lines even though the oil belongs to the owner of the pipe lines;²⁹ (b) oil in interstate transit, even though stored temporarily in tanks;³⁰ (c) sale of coal f.o.b. at the mines, the cars when loaded to be shipped immediately to another state;³¹ (d) sale

²⁷ *Louisiana Public Service Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, 76 L. ed. 201.

²⁸ *Fargo v. Michigan*, 121 U. S. 230, 30 L. ed. 888; *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. ed. 333; *United States v. South Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. ed. 1440; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 72 L. ed. 270; *Baltimore & O. S. W. R. Co. v. Seattle*, 260 U. S. 166, 67 L. ed. 189; *Manlowe Transfer & Distributing Co. v. Department of Public Service*, 18 Wash. (2d) 754, 140 P. (2d) 287, 155 A. L. R. 928; *United States v. Erie R. Co.*, 280 U. S. 98, 74 L. ed. 187; *Southern*

Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.

²⁹ *United States v. Ohio Oil Co.*, 234 U. S. 548, 58 L. ed. 1459. See also *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 86 L. ed. 371; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. ed. 1037.

³⁰ *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 72 L. ed. 270.

³¹ *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. ed. 188.

within a state of a commodity shipped from without a state;³² (e) merchandise wrapped in separate bundles, addressed to purchaser and then packed in a large case and shipped to an agent in another state for delivery;³³ (f) sale within a state of an article to be manufactured for the buyer without the state;³⁴ (g) insurance transactions which stretch across state lines;³⁵ and (h) trade in news carried on among the states.³⁶

The following cases have been held not to be interstate commerce: (a) Goods sold in the original package;³⁷ (b) goods shipped from without a state to a warehouse within a state and stored there, and then sold from the warehouse;³⁸ (c) slaughtering of poultry in a slaughterhouse and then wholesaled to retail merchants, even though most of the poultry came to the slaughterhouse from without the state.³⁹ In each of these cases, however, the commencement or termination of interstate commerce varies with the nature of the power exercised by Congress or by the states.

§ 215. Original Package Doctrine. The original package doctrine was announced by Chief Justice Marshall in 1827 in the case of *Brown v. Maryland*. The doctrine provided that goods imported in foreign commerce were not subject to state taxation or regulation until sale in the original package or the breaking of such package. By way of obiter dicta, he remarked: "We suppose the principles laid down in this case to apply equally to importations from a sister state."⁴⁰ Although this obiter dicta was repudiated in the License Cases, it was announced as a doctrine in 1890, and applied to interstate commerce.⁴¹

³² *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52, 71 L. ed. 534.

³³ *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295.

³⁴ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136.

³⁵ *United States v. South Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. ed. 1440; *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643, 88 L. ed. 1509.

³⁶ *Associated Press v. United*

States, 326 U. S. 1, 89 L. ed. 2013.

³⁷ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49.

³⁸ *Duncan v. State*, 105 Ga. 457, 30 S. E. 755.

³⁹ *Schechter Poultry Co. v. United States*, 295 U. S. 495, 79 L. ed. 1570.

⁴⁰ *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

⁴¹ *License Cases*, 5 How. 504, 12 L. ed. 256; *Leisy & Co. v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252.

An original package has been defined to be such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation between dealers in the ordinary course of actual commerce. It is not the size or the permanency of the package that is determinative of the question, but the bona fides of the transaction. For example, packages of cigarettes shipped loosely in a basket were held not to be shipped in an original package, while a ten-pound package of oleomargarine was held to be an original package.⁴²

The original package test is not inflexible and final as to whether a regulation is a burden on interstate commerce. In fact it amounts only to a rule of judicial convenience, and is not applied for the purpose of state taxation. The Supreme Court has held that it is but a convenient boundary line, and one that is sufficiently precise save in exceptional conditions. Justice Cardozo referred to it as the illustration of a principle and not an ultimate principle.⁴³

§ 216. Commencement and Termination of Power. An important question arises in interstate and foreign commerce, as to when the power of the Federal government begins and when it terminates. This question is especially important in the right of the state to collect property taxes, license or privilege taxes, and sales or use taxes, which will be discussed in a later chapter.⁴⁴

Exportation is not begun until the goods are committed to the common carrier for transportation in interstate commerce. The carrying of them in trucks, carts or other vehicles, or floating them to a depot where the journey is to commence, is no part of the journey. This includes all preliminary work, putting the property in a state of preparation and readiness. Until actually launched on its way to another state, the goods cannot be considered in interstate commerce.⁴⁵

⁴² *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49; *Hebe Co. v. Shaw*, 248 U. S. 297, 63 L. ed. 255; *Mexican Petroleum Corp. v. Portland*, 12 Me. 128, 115 Atl. 900, 26 A. L. R. 965. See also *Wilcoil Corp. v. Pennsylvania*, 294 U. S. 169, 79 L. ed. 838 (tank cars containing fuel oil shipped from one state to another for delivery on purchaser's siding,

held not to be deemed original package).

⁴³ *Baldwin v. Seelig, Inc.*, 294 U. S. 511, 79 L. ed. 1032. See also *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382 and *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252.

⁴⁴ See Chap. 27, §§ 352-360, *infra*.

⁴⁵ *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.

The goods remain in interstate commerce until the importer has so acted upon them that they have become incorporated in and mixed up with the general mass of property. For example, the breaking of the original package, or the use or sale of the property.⁴⁶

Goods in the course of transportation from one state to another, but temporarily detained or located in a state, are still adjudged to be in interstate commerce. For example, a boom of logs may be required to await high waters or livestock may be unloaded from a train or truck for the purpose of feed or exercise, or for the purpose of finding a purchaser at stockyards.⁴⁷

§ 217. Production as Interstate Commerce. Production or manufacturing may be an incident of, or may be classed as a part of a process or transaction constituting interstate commerce. A company which buys supplies and transports the raw materials from state to state and later sells its finished products and ships or transports them beyond the line of the state in which the manufacturing plant is located is engaged in interstate commerce. This is the doctrine in effect announced by the Supreme Court in a leading case sustaining the validity of an order of the National Labor Relations Board.

The Supreme Court held that, since the company imported its raw materials from other states and for this purpose operated steamship lines on the Great Lakes, owned coal mines in Pennsylvania, and limestone properties in West Virginia, and, after manufacture, shipped its products to warehouses in Chicago, Detroit and Cleveland, the entire process of manufacture was interstate commerce and was subject to regulation by the federal government, Chief Justice Hughes announcing that "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive

⁴⁶ *Leisy & Co. v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

⁴⁷ *Champlain Realty Co. v. Brat-*

telboro, 260 U. S. 366, 67 L. ed. 309; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518.

industry although the industry when separately viewed is local."⁴⁸

In a later case, the court stated the doctrine more emphatically where the employer himself was not engaged in interstate commerce. He conducted what is known as a contract shop in Somerville, New Jersey, a relatively small business of processing or manufacturing materials of various types of women's sports garments belonging to others. But there was a continuous day-by-day flow of interstate shipments to and from his factory. Justice Stone, delivering the opinion of the court, asserted: "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers. . . . It was not any the less interstate commerce because the transportation did not begin or end in the transfer of title of the merchandise transported. Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress."⁴⁹ And the doctrine is applicable to a manufacturer or processor even though his product constitutes only a relatively small percentage of the entire industry engaged in such manufacturing or processing.⁵⁰

This doctrine has been extended to the production of a commodity such as wheat, even though the amount of production was trivial and even though such wheat was not intended in any part for commerce, but was raised wholly for consumption on the farm. The Supreme Court has held that the production of such wheat was within the power of regulation conferred by the commerce clause, where the purpose of such regulation was to control the market price of wheat in interstate commerce. "It can hardly be denied," asserted Justice Jackson, "that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition, such home-grown wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is

⁴⁸ National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 32, 81 L. ed. 893.

⁴⁹ National Labor Relations Board v. Fainblatt, 306 U. S. 601, 83 L. ed. 1015. See also Consoli-

dated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 83 L. ed. 126.

⁵⁰ National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 84 L. ed. 1226.

never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."⁵¹

The doctrine has also been extended to one engaged, as an independent contractor, in the drilling of oil wells where there was reasonable grounds for the contractors to anticipate at the time of the drilling that the oil produced by the wells drilled would move into other states. It has also been extended to one employed as a night watchman in the production of goods destined in part, for shipment in interstate commerce. These actions arose under the Fair Labor Standards Act.⁵² But the Supreme Court construing the same act, held that a cook and caretaker for maintenance-of-way employees of an interstate railroad was not engaged in commerce, or in the production of goods for commerce. In delivering this opinion, Justice Reed observed that "there is no single concept of interstate commerce, which can be applied to every federal statute regulating commerce."⁵³

§ 218. Power of Congress Exclusive. The power of Congress is exclusive and has no limitations other than such as arise from the Constitution itself, and it may adopt measures effectually to prevent every unreasonable, undue or unjust obstruction to, burden upon, or discrimination against interstate commerce whether it results from state regulation or the voluntary acts of carriers.⁵⁴

⁵¹ *Wickard v. Filburn*, 317 U. S. 111, 87 L. ed. 122. See *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315 (production and sale of goods locally, although finally destined for interstate commerce, are subject to state regulation, and are to be distinguished from goods produced directly for interstate commerce).

⁵² *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 87 L. ed. 83; *Walton v. Southern Package Corp.* 320 U. S. 540, 88 L. ed. 298.

⁵³ *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. ed. 1538. Supreme Court has held that employees of an office building whose tenants were en-

gaged in manufacturing goods for interstate commerce, or when 58% of the office space was used by tenants engaged in interstate commerce were subject to the Fair Labor Standards Act. But its holding was contra when only 42% of the rentable area was so engaged. *Kirshbaum v. Walling*, 316 U. S. 517, 86 L. ed. 1638; *Borden Co. v. Borella*, 325 U. S. 679, 89 L. ed. 1865; *10 East 40th Street Bldg. v. Callus*, 325 U. S. 578, 89 L. ed. 1806.

⁵⁴ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The power also extends to intrastate rates. Congress has empowered the Interstate Commerce Commission to prescribe rates within the states in place of those found unduly to discriminate against persons and localities in interstate commerce or against that commerce. Pursuant to this power, the commission has required carriers to apply on intrastate transportation such reasonable charges as will produce its fair share of the amount needed to pay operating expenses, provide an adequate railway system and yield a reasonable rate of return on the value of the property used in the transportation service.⁵⁵ The power also extends to other intrastate activities which in a substantial way interfere with or obstruct the power granted by the commerce clause to Congress. For example, the marketing of a local product such as milk in competition with that of a like commodity may so interfere with interstate commerce or its regulation as to afford a basis for congressional regulation of the intrastate activity.⁵⁶ But the commission is without jurisdiction over intrastate rates except to protect, or to make effective some regulation of interstate commerce, and the states' power cannot be deemed to be supplanted so long as the exercise of the commission's authority is left in serious doubt.⁵⁷

Although the precise boundary between national and state power has never been and doubtless never can be delineated by a single abstract definition, the general rule is that the power is necessarily exclusive whenever the subjects of it are national in character, or admit only of one uniform system or plan of regulation. But in those fields of commerce where national uniformity is not essential either the state or Federal government may act.⁵⁸ The fact is that, in the matter of interstate commerce, the United States is but one country, and from necessity must be subject to but one system of regulations, and not to a multitude of systems. In the

⁵⁵ *Louisiana Public Service Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, 76 L. ed. 201; *North Carolina v. United States*, 325 U. S. 507, 89 L. ed. 1760 (power of Interstate Commerce Commission to fix intrastate rates is dominant only to the extent that it is necessary to alter such rates as are injurious to interstate commerce).

⁵⁶ *United States v. Wrightwood*

Dairy Co., 315 U. S. 110, 86 L. ed. 726.

⁵⁷ *Illinois Commerce Commission v. Thomson*, 318 U. S. 675, 87 L. ed. 1075.

⁵⁸ *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 143, 86 L. ed. 754; *United States v. South Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. ed. 1440.

earlier cases the Supreme Court held that the fact Congress had failed to make express regulations indicated that the subject should be free from any restrictions or impositions, and not that the field was subject to state regulation.⁵⁹ But more recently it has said that when there was a partial exercise of powers by the Federal government, the state might legislate freely upon those phases of commerce which were left unregulated by the nation, especially when such regulations were aimed at matters of local concern. The incidence of the particular state enactment must determine whether it has transgressed the power left to the states to protect their special state interests.⁶⁰

§ 219. Power of States—Restrictions. The only way that interstate commerce can be affected by state laws is indirectly by virtue of its police power and its jurisdiction over persons and property within its limits.

The exercise of the following powers has been held not to violate the commerce clause. A state may provide for the security of the lives, health and comfort of persons and the protection of property. It may also do those things which only incidentally affect commerce such as the establishment and regulation of highways, canals, wharves, railroads, ferries and other commercial facilities. It may enact inspection laws to secure due quality and measure of products and commodities. It may enact laws to regulate and restrict the sale of articles deemed injurious to the health and morals of the community. It may impose taxes upon all property within the state, mingled with and forming part of the great mass of property of the state. Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end.⁶¹ In order for state regulations to be valid, they must not be inconsistent with any congressional regulation upon the same subject.⁶²

⁵⁹ *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 30 L. ed. 694.

⁶⁰ *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 86 L. ed. 754; *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315; *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 88 L. ed. 1227, 152 A. L. R. 1072.

⁶¹ *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 30 L. ed. 694.

See also *California v. Thompson*, 313 U. S. 109, 85 L. ed. 1219; *Duckworth v. Arkansas*, 314 U. S. 390, 86 L. ed. 294, 138 A. L. R. 1144.

⁶² *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 30 L. ed. 694. See also *California v. Thompson*, 313 U. S. 109, 85 L. ed. 1219; *Duckworth v. Arkansas*, 314 U. S. 390, 86 L. ed. 294, 138 A. L. R. 1144.

The following taxation and regulation has been held to be an interference with the power of Congress. In the making of internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce. It cannot impose taxes upon property imported from abroad, or from another state and not yet become a part of the common mass of property therein, and no discrimination can be made by any regulations adverse to the persons or property of other states.⁶³

§ 220. Police Power as Restriction. It is well settled that the police power of a state must be held to embrace such reasonable regulations as will protect the public health, public safety, and the public welfare, and the mode and manner in which this shall be accomplished is within the discretion of the state, subject to the restriction that no rule or regulation shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. In case of conflict a local rule or enactment must yield to the Federal government in the exercise of any power it possesses under the Constitution, or with any right that instrument gives or secures.⁶⁶

Under this power, the state may enact legislation making interstate carriers liable for acts of nonfeasance and misfeasance committed within the state. The state may prescribe rules for construction of railroads, and for their management and operation designed to protect persons and property otherwise endangered by their use.⁶⁷

Such legislation and rules, however, cannot be inconsistent with any congressional legislation upon the subject. For example: a state may regulate the speed of trains at crossings, and drawbridges and through crowded thoroughfares. It may require tracks to be fenced and grade crossings to be abolished. It may require a terminal railroad company to provide cabooses for its employees on trains, even though such trains go to and from points across a state line, but it may not limit the length of freight and

⁶³ *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 30 L. ed. 694. 102, 9 L. ed. 648.

⁶⁶ *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878; *New York v. Miln*, 11 Pet.

⁶⁷ *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194.

passenger trains so as to injuriously affect interstate commerce.⁶⁸ It may require engines to be equipped with bells, signal lights and whistles, and it may require tariffs and time tables to be posted.⁶⁹ It may require an interstate carrier to provide switching and terminal facilities.⁷⁰ It may, in fact, enact all legislation in aid of commerce, and it may regulate the relative rights and duties of all persons and corporations within its limits.⁷¹

The following illustrations will help to define what exercise of power is an interference with interstate commerce. A state may not undertake to restrict the persons and things to be carried, or to regulate tolls, fares or freight, or require trains to be stopped at stations otherwise properly serviced. It has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or by imposition of conditions, to fetter their right to carry on such commerce or to subject them to requirements which are unreasonable or which pass beyond the bounds of suitable local requirements.⁷² A state statute requiring all animals desired to be sold for food in Minnesota to be inspected within the state before being slaughtered was held to interfere with interstate commerce in meat, and it was no defense that the regulation was imposed upon residents of Minnesota as well as other states.⁷³ Likewise, a state statute permitting the sale of cans of a mixture of glucose and refiner's syrup shipped into Wisconsin only when the labels prescribed by the Wisconsin law were substituted for those affixed under the Federal pure food and drug act, was declared to be an unlawful attempt by the state to discredit and burden legitimate Federal regulations of interstate commerce, and to impair the effect of a Federal law which had been enacted under the constitutional power of Congress over the subject.⁷⁴

⁶⁸ *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702; *Terminal R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 87 L. ed. 571; *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, 65 L. ed. 322.

⁶⁹ *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312.

⁷⁰ *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878; *Colorado v. United States*, 271 U. S. 153, 70

L. ed. 878.

⁷¹ *Lord v. Goodal, N. & P. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224.

⁷² *Cleveland, C. C. & St. L. R. Co. v. Illinois ex rel. Jett*, 177 U. S. 514, 44 L. ed. 868; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193.

⁷³ *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455.

⁷⁴ *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754.

In every case the question necessarily arises: Is the statute or regulation a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary or arbitrary interference with interstate commerce? ⁷⁵⁻⁷⁶

§ 221. **State Barriers.** In recent years, there has been a growing tendency for states to attempt to raise economic barriers against competition with the products of another state or the labor of its residents, and they have attempted to limit the right of entry and residence of citizens of other states and of the United States on the ground of indigence.

One state in its dealing with another may not place itself in a position of economic isolation. Neither the power to tax nor the police power may be used by the state to establish a barrier against the products or labor of another state. Such restrictions set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. For example, a milk control act prohibiting the sale of milk brought from outside the state, unless the price paid the producers would be equal to the minimum price required to be paid to the producers inside the state, was held invalid, the court saying: "It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, unless the scale has been observed."⁷⁷

The Supreme Court also held invalid as an unconstitutional barrier to interstate commerce a state statute which penalized the bringing into the state any indigent person or persons not residents of the state who had no relatives or friends able and willing to support them. "There are boundaries to the permissible area of State legislative activity," asserted Justice Byrnes speaking of the police power, "and none is more certain than the prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the trans-

⁷⁵⁻⁷⁶ *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523..

⁷⁷ *Baldwin v. Seelig*, 294 U. S. 511, 79 L. ed. 1032, 101 A. L. R. 55.

portation of persons and property across its borders." To which Justice Douglas added: "The right to move freely from state to state is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."⁷⁸

§ 222. Rule of Taxation. Although the line of demarcation between the exclusive power of Congress and the powers of the states has not been defined with an exactness that has avoided certain interference on the part of the states, the courts have recognized certain rules of taxation.⁷⁹

Discussing the question of whether a sales tax enacted by the city of New York was invalid as an interference with interstate commerce, Justice Stone observed: "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states. But it is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase of the cost of doing business."⁸⁰

The following rules are now well established by the decisions of the Supreme Court:

(a) Federal Regulation does not prevent state taxation. For example a state may tax telephone and telegraph messages carried and delivered exclusively within the states. Also a state may levy

⁷⁸ *Edwards v. California*, 314 U. S. 160, 86 L. ed. 119. See also *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103 (state cannot deny foreign corporation right to maintain action in its courts for goods sold in interstate commerce).

⁷⁹ *Pacific Telephone & Telegraph Co. v. Tax Commission of Wash-*

ington, 297 U. S. 403, 80 L. ed. 760, 105 A. L. R. 1; *Fisher's Blend Station v. State Tax Commission*, 297 U. S. 650, 80 L. ed. 956.

⁸⁰ *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 565, 128 A. L. R. 876.

a tax on a foreign corporation for the privilege of doing an intrastate business.⁸¹

(b) A state cannot, however, tax interstate or foreign commerce, lay a tax on business constituting interstate commerce or the privileges of engaging in it. For example, a state may not tax telegrams or telephone messages or replies to messages sent from points within the state to points without.⁸²

(c) A regulation or tax of a state, applied directly to intrastate commerce only may in fact burden the interstate business, where the interstate and intrastate commerce are served by the same instrumentalities of the common carrier. The fact that a portion of the business is intrastate commerce, and therefore taxable, does not justify a tax either on the interstate business or on the whole business without discrimination.⁸³

(d) A state tax upon the privilege of engaging in local business is void if, by reason of its character and amount, it imposes a direct burden upon interstate commerce. For example, a state occupation tax measured by the gross receipts from radio broadcasting stations within the state licensed to broadcast, and broadcasting over an area embracing other states was held to be an unconstitutional burden on interstate commerce.⁸⁴

(e) A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through indis-

⁸¹ Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. ed. 622; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Polish Nat. Alliance v. National Labor Relations Board, 322 U. S. 643, 88 L. ed. 1509; Atlantic Refining Co. v. Virginia, 302 U. S. 22, 82 L. ed. 24.

⁸² Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S. 403, 80 L. ed. 760, 105 A. L. R. 1; New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, 74 L. ed. 463; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683; Best & Co. v. Maxwell, 311

U. S. 454, 85 L. ed. 275; Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 75 L. ed. 953; Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311; Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295; Harper v. Alderson, — W. Va. —, 30 S. E. (2d) 521, 153 A. L. R. 819.

⁸³ Pacific Telephone & Telegraph Co. v. Tax Commission of Washington, 297 U. S. 403, 80 L. ed. 760, 105 A. L. R. 1.

⁸⁴ Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311; Fisher's Blend Stations v. State Tax Commission, 297 U. S. 650, 80 L. ed. 956; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 69 L. ed. 916, 44 A. L. R. 1219.

criminate application to instrumentalities common to both sorts of commerce, is invalid.⁸⁵

(f) A state tax on the gross receipts of a corporation engaged in interstate commerce is void. But a state tax on gross income is valid where the manufactory is in fact intrastate, even though orders may have been solicited in other states and interstate communications by mail, telephone, telegraph and transportation may have been used in conducting the business. A tax on the gross income is also valid when made in lieu of taxes on the property of such a corporation.⁸⁶

(g) A state tax on the net income of a corporation or other person engaged in interstate commerce is not void as a burden on interstate commerce.⁸⁷

(h) A state may tax the gross receipts from interstate transactions consummated within its borders where it treats wholly local transactions the same way. Such local activities or privileges were held by the court to be as adequate to support this tax as they would be to support a sales tax.⁸⁸

(i) A state may impose a tax upon both foreign and domestic corporations doing business within the state for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state.⁸⁹

(j) Where a state tax is exacted from one doing an interstate and an intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax;

⁸⁵ *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934.

⁸⁶ *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956; *Department of Treasury of Indiana v. Ingram-Richardson Mfg. Co.*, 313 U. S. 252, 85 L. ed. 1313; *J. D. Adams Mfg. Co. v. Soren*, 304 U. S. 307, 82 L. ed. 1365, 117 A. L. R. 429; *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200.

⁸⁷ *United States Glue Co. v. Town*

of Oil Creek, 247 U. S. 321, 62 L. ed. 1135, Ann. Cas. 1918 E 748; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, Ann. Cas. 1912 B 1312.

⁸⁸ *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 88 L. ed. 1313.

⁸⁹ *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U. S. 435, 88 L. ed. 1373; *Wisconsin Gas & Electric Co. v. United States*, 322 U. S. 526, 88 L. ed. 1434.

and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.⁹⁰

(k) The rule of property taxation is that the value of the property is the basis of taxation. For example, a telegraph company owning a line in a state may be taxed by a state on such proportion of the whole property exclusive of real estate and machinery subject to local taxation, which the length of its lines within the state bears to the total length of its lines, and by taking the market value of its stock in fixing the valuation of its entire property.⁹¹

It has been found difficult to prescribe a satisfactory rule of taxation between businesses and agencies engaged in interstate commerce where the property is of a transient character, such as cars and rolling stock of a railroad. In a Pennsylvania case, the Supreme Court held that the state could take as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states. Other bases of apportionment are the ratio of the total capital to that portion employed within the state, or the ratio between the total value of the property of the corporation to the value of the property employed within the state. In later cases, the court held that, where a corporation had cars continuously moving in and out of a state, the state could tax the number of cars which, on the average, are physically within the state, and that the State of Minnesota could impose a personal property tax upon a fleet of airplanes having their home port in the state even though only a part of the planes were within the state on tax day, and even though personal property taxes were paid in other states on a proportion of the full fleet.⁹² The Supreme Court has also held an apportionment of

⁹⁰ Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384, 79 L. ed. 934; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 580; Pacific Telephone & Telegraph Co. v. Tax Commission of Washington, 297 U. S. 403, 80 L. ed. 761.

⁹¹ Western Union Tel. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49.

⁹² Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613; United States Glue Co. v.

Town of Oil Creek, 247 U. S. 321, 62 L. ed. 1135, Ann. Cas. 1918 E 748; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899; Postal Telegraph-Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311; Southern Pac. Co. v. Kentucky, 22 U. S. 63, 56 L. ed. 96; Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 78 L. ed. 238; Northwest Air Lines v. Minnesota, 322 U. S. 292, 88 L. ed. 1283, 153 A. L. R.

revenues valid.⁹³

The state may tax property located within its limits, such as a railroad bridge, or right of way, or other property. The fact that such property is an agency of interstate commerce does not prevent the state from taxing it.⁹⁴ Goods, or other property, may be taxed before it becomes a part of interstate commerce, and conversely they may be taxed when they cease to be the subject of such commerce.⁹⁵

§ 223. **License Fees and Privilege Taxes.** A state has a wide discretion in the classification of businesses which may be subject to special forms of regulation or taxation through an excise or license tax. It may tax a general business, even though it may be carried on by residents and nonresidents, or concerns goods located in another state, and the fact that it may consist wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state does not necessarily involve the taxation of interstate commerce.⁹⁶

No license fee or privilege tax, however, may infringe the paramount power of Congress to regulate commerce, or at least amount to a discrimination against interstate or foreign commerce.⁹⁷

The following taxes have been held valid. A state may impose a registration or license fee on those using motor vehicles in the state, although engaged in interstate commerce, or the state may impose a reasonable charge for the use of its highways so employed, but the tax cannot be an unreasonable charge for the privilege.⁹⁸

245; *Union Tank Line v. Wright*, 249 U. S. 275, 63 L. ed. 602.

⁹³ *Illinois Cent. R. Co. v. Minnesota*, 309 U. S. 157, 84 L. ed. 670; *Pullman Co. v. Richardson*, 261 U. S. 330, 67 L. ed. 682.

⁹⁴ *Wells v. Nevada*, 248 U. S. 165, 63 L. ed. 190; *Minnesota v. Blasius*, 290 U. S. 1, 78 L. ed. 131 (cattle in stockyards in course of interstate commerce).

⁹⁵ *Coe v. Errol*, 116 U. S. 524, 29 L. ed. 715; *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929. See also *Monometer Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141; *Virginia v. Imperial Oil Co.*, 293 U. S. 15, 79 L. ed. 171.

⁹⁶ *Ficklen v. Taxing Dist. Shelby*

Co., 145 U. S. 1, 36 L. ed. 601.

⁹⁷ *Ficklen v. Taxing Dist. Shelby Co.*, 145 U. S. 1, 36 L. ed. 601; *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 30 L. ed. 694; *Di Santo v. Pennsylvania*, 273 U. S. 34, 71 L. ed. 524.

⁹⁸ *Hendricks v. Maryland*, 235 U. S. 610, 59 L. ed. 385; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. ed. 551; *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439. See also *Ingels v. Morf*, 300 U. S. 290, 81 L. ed. 653 (license fee under caravan act held invalid).

A municipality may impose a tax upon each telegraph pole installed in the city by a telegraph company engaged in interstate commerce to compensate the city for the burden imposed upon it.⁹⁹ But a state cannot require a party to take out a license to carry on interstate commerce.¹⁰⁰

§ 224. Regulation of Navigation—Vessels. The power of Congress over navigable waters and to regulate navigation is not expressly granted by the Constitution.¹⁰¹ The power is incidental to the powers granted in Article III. of the Constitution and to the power to regulate interstate and foreign commerce, and includes all the inherent powers possessed by the states and the national government prior to the adoption of the Constitution, and which have always existed in the Parliament of England.¹⁰² Under these grants the National government has taken over the entire body of rules, precepts, and practices traditionally known as maritime law.¹⁰³

Navigation is under the control of Congress. It is regulated by the act of March 3, 1899, which was enacted for the protection of navigation and navigable waters and the act of March 28, 1908, which related to shipping.¹⁰⁴ Navigable waters include not only those waters which may be subject to navigation in their natural condition, but also those which may be subject to navigation by making reasonable improvements, and it is not necessary that these improvements be planned or in contemplation of the government. A stream may be navigable for the purpose of Federal control, despite the obstruction of falls, sand bars, barriers, and shifting currents, and especially is this true under the Federal Power Act.¹⁰⁵

The power of Congress to regulate commerce includes the power to regulate navigation in so far as it is conducted between this country and foreign nations, and between the states. This power

⁹⁹ *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 63 L. ed. 590.

¹⁰⁰ *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

¹⁰¹ *Leovy v. United States*, 177 U. S. 621, 44 L. ed. 914.

¹⁰² *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

¹⁰³ *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. ed. 596; *The Lottawanna*, 21 Wall. 558, 22 L. ed. 654.

¹⁰⁴ 33 USC 289; 33 USC 152, 153, 441 et seq.; 46 USC 1 et seq.; 46 USC 1011 et seq.

¹⁰⁵ *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243. See also *In re Garnett*, 141 U. S. 1, 35 L. ed. 631.

has enabled Congress: (a) To define navigable waters;¹⁰⁶ (b) to formulate international rules for navigation at sea;¹⁰⁷ (c) to formulate navigation rules for harbors, river and inland waterways;¹⁰⁸ (d) to define general duties of ship officers after collision or accident;¹⁰⁹ (e) to construct and maintain bridges over navigable waters;¹¹⁰ (f) to provide for river and harbor improvements;¹¹¹ (g) to establish anchorage grounds and harbor regulations;¹¹² (h) to regulate the commercial marine and to enact all laws in the regulation of navigation and trade, both foreign and coastwise, and in addition to exercise many other powers for the promotion and protection of this form of commerce.¹¹³

The powers of the states extend to regulation of the following cases: (a) Regulation of ferries,¹¹⁶ (b) regulation of ports and harbors and the maintenance of wharves,¹¹⁷ (c) enactment of state inspection laws,¹¹⁸ and (d) under certain conditions the state may regulate the conduct of its citizens on the high seas beyond its territorial limits.¹¹⁹ The states retain the power of licensing pilots, at least until Congress shall have acted. The reason that these regulations are under the authority of the states is that they are local in character and affect interstate commerce only incidentally.¹²⁰

§ 225. Regulation of Railroads. The regulation of the railroads is the principal function of the Interstate Commerce Commission. This commission was organized under the provision of

¹⁰⁶ 33 USC 1; *Cooley v. Board of Wardens*, 12 How. 314, 13 L. ed. 996; *The Daniel Ball v. United States*, 10 Wall. 563, 19 L. ed. 1001; *Leovy v. United States*, 177 U. S. 621, 44 L. ed. 914.

¹⁰⁷ 33 USC 61.

¹⁰⁸ 33 USC 151; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805.

¹⁰⁹ 33 USC 361.

¹¹⁰ 33 USC 491; *Newport & Cincinnati Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143.

¹¹¹ 33 USC 541; *Chicago v. Law*, 144 Ill. 578, 33 N. E. 855.

¹¹² 33 USC 471.

¹¹³ 46 USC 1-26; *Sinnot v. Dav-*

enport, 22 How. 243, 16 L. ed. 243.

¹¹⁶ *Vidalia v. McNeely*, 274 U. S. 676, 71 L. ed. 1292. For ferry engaged in interstate commerce, see *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

¹¹⁷ *Parkersburg & Ohio River Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584.

¹¹⁸ *Foster v. Port of New Orleans*, 94 U. S. 246, 24 L. ed. 122.

¹¹⁹ *Skiriotes v. Florida*, 313 U. S. 69, 85 L. ed. 1193.

¹²⁰ *Anderson v. Pacific Coast Steamship Co.*, 225 U. S. 187, 56 L. ed. 1047; *Thompson v. Darden*, 198 U. S. 310, 49 L. ed. 1064.

the original Interstate Commerce Act of 1887. It is a corporate agency of the Federal government with administrative and quasi-judicial powers, and broad powers of investigation, regulation and control. It has authority of its own motion to make investigations and institute proceedings; to compel the attendance of witnesses and the production of books, tariffs, contracts, agreements and other documents; to determine what rates are unjust, unreasonable, discriminatory or unduly preferential; to prescribe reasonable rates, fares, and charges, and to fix maximum and minimum rates and charges; and to publish its decisions and reports.¹²¹

Although the railroads remain the private property of their owners, and are privately operated, and as property they cannot be taken from their owners without just compensation, they are subject to great regulation in the interest of interstate commerce. The discretion of managers and stockholders, at one time nearly absolute, is now subject in countless ways to compulsion or restraint in the interest of the public welfare. No longer may the carrier arbitrarily fix its own rates.¹²² No longer may it interfere or unduly influence its employees in their self organization.¹²³ No longer may the carrier abandon any portion of its road without the consent of the Interstate Commerce Commission, even though operated at a loss, and no longer may it extend its road by its own voluntary act.¹²⁴ No longer may it issue securities unless the commission shall have found that such issue will be compatible with

¹²¹ *United States v. Lowden*, 308 U. S. 255, 84 L. ed. 208; 49 USC 11; 15 USC 21, 45; 28 USC 225 (e); *Davis v. Rochester Can Co.*, 220 App. Div. 487, 221 N. Y. S. 666, aff'd 247 N. Y. 521, 161 N. E. 166; *United States v. Missouri Pac. R. Co.*, 65 Fed. 903; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1062 (power of state commission).

¹²² *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. ed. 699; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Railroad*

Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416; *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. ed. 327; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 57 L. ed. 1511; *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 68 L. ed. 388, 33 A. L. R. 472.

¹²³ *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 74 L. ed. 1054.

¹²⁴ *Interstate Commerce Commission v. Oregon-Washington Railway & Navigation Co.*, 228 U. S. 14, 77 L. ed. 588.

public good. The purpose of this regulation is to foster, protect and control commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large and to promote the growth of commerce and to insure its safety.¹²⁵

This regulation has been effected pursuant to the provisions of certain statutes, the most important of which are as follows:

(a) Interstate Commerce Act adopted in 1887.¹²⁶ (b) The Hepburn Act of 1906 enlarged the powers of the Interstate Commerce Commission and, among other provisions, made it unlawful for railroads to transport any article which it owned or in which it had proprietary interest unless such article was necessary for the conduct of its business.¹²⁷ (c) Employers' Liability Act of 1906 and amendments, and amendments of 1908 and 1909, which modified the "fellow servant rule."¹²⁸ (d) Adamson Act of 1916, establishing an eight-hour day.¹²⁹ (e) Transportation Act of 1920, which terminated Federal control assumed during the World War, provided for reimbursement of deficits during Federal control, affirmed the power to make valuation of property, and conferred upon the Interstate Commerce Commission certain additional duties among which was the power to suspend rates and to fix minimum rates, etc.¹³⁰ (f) Railroad Reorganization Acts of 1933 and 1935. These acts provided a procedure for reorganization for insolvent railroads.¹³¹ (g) Railway Labor Acts of 1926 and 1934, the purpose of which was to provide for prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions in order to avoid any interruption of commerce or to the operation of any carrier.¹³² (h) Railroad Unemployment Insurance Act of 1938, which provided for the payment of a schedule of benefits to the unemployed, contributions to the insurance fund to be made by the employer and the employee.¹³³

¹²⁵ United States v. Lowden, 308 U. S. 225, 84 L. ed. 208.

¹²⁶ 49 USC 1; Interstate Commerce Commission v. Baltimore R. Co., 145 U. S. 265, 36 L. ed. 699.

¹²⁷ 49 USC 1 et seq.; United States v. Delaware & Hudson Co., 213 U. S. 366, 53 L. ed. 836.

¹²⁸ 45 USC 51-59; Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125.

¹²⁹ 45 USC 65, 66.

¹³⁰ 49 USC 71-74; Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456, 68 L. ed. 388.

¹³¹ 11 USC 205.

¹³² 45 USC 151-163; Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. ed. 789.

¹³³ 45 USC 351-357.

§ 226. **Regulation of Motor Transportation.** Interstate motor transportation is regulated by the Motor Carrier Act of 1935. The act applies to the transportation of both passengers and property. It includes the procurement of commerce and provision for its facilities.¹³⁴

The act is designed to regulate transportation by motor carriers in the public interest; to promote adequate, economical and efficient service and reasonable charges by motor carriers, without unjust discriminations and unfair competition; to co-ordinate transportation between motor and other carriers; to develop and preserve a highway transportation system properly adapted to the needs of commerce and of national defense; and to co-operate with the states in the regulation of the industry.¹³⁵ Under this act Congress has conferred upon the Interstate Commerce Commission full jurisdiction in the commercial, financial, and business aspects of interstate highway transportation.

It has left in the states the reserved jurisdiction of the establishment, preservation and maintenance of highways and safety thereon. A state, therefore, may reasonably control and regulate the use of its highways so long as there is no conflict with the acts passed by Congress.¹³⁶ A common carrier is not entitled as a right to traverse highways of the state where the traffic is so congested that it is undesirable to add thereto, even though it is engaged in interstate commerce.¹³⁷ A state may require a private carrier for hire to obtain a certificate of public convenience and necessity, to give bond for protection against damage caused by negligence and to pay an annual registration and license fee,¹³⁸ but to justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities,

¹³⁴ 49 USC 301-327. See Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 81 L. ed. 965.

¹³⁵ 49 USC 301-327.

¹³⁶ Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385; Maurer v. Boardman, 336 Pa. 17, 7 A. (2d) 466; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167.

¹³⁷ Bradley v. Public Utilities

Commission of Ohio, 289 U. S. 92, 77 L. ed. 1053. See also Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623 and Dixie Ohio Express Co. v. State Revenue Commission of Georgia, 306 U. S. 72, 83 L. ed. 495.

¹³⁸ Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285, 79 L. ed. 1439.

or of enforcing regulations of commerce, which are within its constitutional power.¹³⁹

§ 227. Regulation of Air Commerce. An Air Commerce Act was enacted by Congress in 1926, and the Civil Aeronautics Act became a law in 1938. This later act defined this form of commerce as follows:

“Air commerce means interstate, overseas or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign air commerce.”¹⁴⁰

The Act of 1938 created three authorities to control air commerce. The Civil Aeronautics Authority was established. This authority is empowered to make rules and regulations, make investigations and hearings, exchange information with foreign governments, and to make reports to Congress. Final orders of the authority, except any order in respect to any foreign air carrier subject to the approval of the President, are subject to review by the Circuit Court of Appeals.¹⁴¹

An administrator appointed by the President and subject to removal by him was provided for. He is empowered to foster and encourage civil aeronautics and air commerce, to designate and establish civil airways, to make recommendations for the safe and efficient movement of air commerce and such additional duties as shall be imposed upon him by the Civil Aeronautics Authority.¹⁴²

The Air Safety Board, which is empowered to make rules and regulations for reporting accidents, to investigate accidents, to make reports, and to assist in ascertaining how accidents may be eliminated was also provided for.¹⁴³

The President was authorized to reserve air space for national defense or other governmental purposes, and, in the District of Columbia, for safety purposes. The states were also authorized to provide for additional air space not in conflict with the air space

¹³⁹ *Ingels v. Morf*, 300 U. S. 290, 81 L. ed. 653.

¹⁴⁰ 49 USC 171 et seq., 401.

¹⁴¹ 49 USC 421, 425; *Humphrey v. United States*, 295 U. S. 602, 79 L. ed. 1611.

¹⁴² 49 USC 421, 451-458; *Myers v. United States*, 272 U. S. 163, 71 L. ed. 160.

¹⁴³ 49 USC 581, 582; *Myers v. United States*, 272 U. S. 163, 71 L. ed. 160.

established by the President, or with any civil or military airway designated under the Act of Congress.¹⁴⁴

The Act of 1926 declares that the Federal government shall possess and exercise complete and exclusive national sovereignty in the air in the space above the United States, including all space above lakes, bays and inland waters, over which the United States shall exercise national jurisdiction. The Secretary of War is given authority to designate military airways, and prescribe rules and regulations for their operation,¹⁴⁵ and during World War II he drafted the use of all commercial air lines for military purposes. These acts apply to both intrastate and interstate air commerce, because regulations must be universally applicable in order to protect interstate air navigation.¹⁴⁶

The states have power of regulation under the police power when the commerce is wholly intrastate, and it does not place a burden on interstate commerce. The state may lay a tax on gasoline used by airplanes engaged in interstate commerce, provided the tax does not place a burden on such commerce.¹⁴⁷

§ 228. Regulation of Telegraph and Telephone. Communication by telephone and telegraph is commerce and, if carried on between different states, is interstate commerce, and is directly under the control and regulation of Congress and free from the control of state regulation, except such as is strictly of a police character. They occupy the same relationship to the carrier of messages as a railroad or a motor company does to a carrier of goods.¹⁴⁸

Pursuant to this power Congress has enacted legislation regulating both interstate telephone lines and interstate telegraph lines. Companies operating these lines must make annual reports covering the nature, value and condition of the lines, and the gross earnings, expenses, etc. Formerly these reports were made to the Interstate Commerce Commission. Under an act adopted June 19, 1934, however, the Federal Communications Commission was created, and all the duties, powers and functions of the Interstate Commerce Commission, relating to the operation of telegraph lines by railroads and telegraph companies granted government aid in

¹⁴⁴ 49 USC 174.

¹⁴⁵ 49 USC 176.

¹⁴⁶ *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. (2d) 761.

¹⁴⁷ *Smith v. New England Air-*

craft Co. Inc., 270 Mass. 511, 170 N. E. 585.

¹⁴⁸ *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311.

the construction of their lines, were vested in the Federal Communications Commission.¹⁴⁹ The lines must operate for the use of the government or the public for commercial or other purposes without discrimination. The commission has authority to make and order the execution of rules and regulations for the operation of the business. These are enforced through the United States courts. The Federal government has priority in sending messages at such rates as the Postmaster General shall fix.¹⁵⁰

§ 229. Regulation of Radio. Radio broadcasting constitutes interstate commerce as to transmission and reception when the radius extends beyond state lines, and the power of Congress to regulate this commerce may be exercised to the utmost extent with no limitation except that prescribed by the Constitution.¹⁵¹

Interstate radio is regulated by the Radio Act of 1934, as amended in 1937. The purpose of this act was to regulate interstate and foreign commerce in communication by wire and radio, so as to make available a rapid, efficient nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges; for the purpose of national defense; and especially for the purpose of maintaining the control of the United States over all the channels of interstate and foreign radio transmission.¹⁵²

The act provided for the Federal Communications Commission composed of seven commissioners with its principal office in the District of Columbia. This commission is an administrative agency created to determine the rights of the people of the United States, in order that they might enjoy the best possible radio service.¹⁵³

The commission, among other powers and duties, has the following: (a) To license radio stations or channels; (b) to prescribe the nature of service of each class of stations; (c) to assign bands of frequencies for each station; (d) to make regulations to prevent interference between stations; (e) to prescribe qualifications for

¹⁴⁹ 47 USC 601.

¹⁵⁰ 47 USC 1-21.

¹⁵¹ *Fisher's Blend Station v. State Tax Commission*, 297 U. S. 650, 80 L. ed. 956; *Pulitzer Pub. Co. v. Federal Communications Commission*, 68 App. D. C. 124, 94 F. (2d) 249.

¹⁵² 47 USC 151, 303; *Heitmeyer*

v. Federal Communications Commission, 68 App. D. C. 180, 95 F. (2d) 91.

¹⁵³ 47 USC 154. See also *Columbia Broadcasting System v. United States*, 316 U. S. 407, 86 L. ed. 1563; *National Broadcasting Co. v. United States*, 316 U. S. 447, 86 L. ed. 1586.

station operators; (f) to license and to suspend the license of any operator; (g) to make general rules and regulations.¹⁵⁴

Under this power the Federal Communications Commission controls radio transmission, and it may do all things necessary to accomplish the purpose of the Radio Act, except that it cannot act arbitrarily or capriciously but must carry out the provision of the law in a reasonable manner to attain a legitimate end. For example, it may delete stations for the purpose of making a fair and equitable distribution of licenses, without considering equality between the states and without regard as to whether the station deleted had given good service or had or had not complied with regulations. It may refuse to grant broadcasting licenses to stations violating its regulations governing exclusive network programs and it may forbid practices to which the anti-trust laws are applicable.¹⁵⁵

Under the Radio Act of 1934, the President is given extraordinary power over the radio during a war. Whenever, in his judgment, the public interest requires, he may use the armed force of the United States to prevent any obstruction or retardation of communication. He may amend or suspend the rules and regulations prescribed by the commission. He may close any station and remove all apparatus and equipment, or he may seize and use the station and equipment, or authorize any department of the government to use it under such regulations as he may prescribe.¹⁵⁶ A license cannot be granted to any foreign government, alien, or any of their agents or representatives or to any corporation of which more than one-fifth of its capital stock is owned by aliens.¹⁵⁷

§ 230. Regulation of Sale of Securities. Congress has authority to regulate the sale of securities, since the use of the mails and other instrumentalities of commerce are involved in their sale and distribution to the public, and it may establish a government agency as an appropriate means for discovering and announcing what securities meet the standards prescribed by it.¹⁵⁸

¹⁵⁴ 47 USC 303.

¹⁵⁵ Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 77 L. ed. 1166, 89 A. L. R. 406; Great Western Broadcasting Ass'n v. Federal Communications Commission, 68 App. D. C.

119, 94 F. (2d) 244; National Broadcasting Co. v. United States, 319 U. S. 190, 87 L. ed. 1344.

¹⁵⁶ 47 USC 306.

¹⁵⁷ 47 USC 310.

¹⁵⁸ Securities & Exchange Commission v. Wickham, 12 F. Supp.

Under this power, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. The acts are designed to procure information for investors in the accounting form prescribed by the Securities and Exchange Commission and to advise them of the bargains offered, and implies a public interest in all companies seeking financial support from the public. The manifest purpose of these acts is to protect the public from fraud and imposition in the sale of securities through the mails and the other instrumentalities of interstate commerce.¹⁵⁹

Unless a registration statement is in effect as to a security, it is unlawful for a person directly or indirectly: (a) To use any instrument of interstate commerce or the mails to sell or offer to buy such security; (b) to carry or cause to carry through the mails or in interstate commerce any such security for the purpose of sale or delivery after sale; (c) to use the mails or any means of transportation in interstate commerce to carry or transmit any prospectus unless it meets the requirements of the law.¹⁶⁰

The information contained in, or filed with any registration statement, is available to the public under such regulations as the commission shall prescribe, and photostatic or other copies of records may be secured upon the payment of a fee.¹⁶¹

There are several securities exempted from the operation of this act. Included in the exemptions are any security which is a part of an issue sold only to people resident within a single state or territory where the issuer of such security is a resident and doing business within, or if a corporation, incorporated by and doing business within such state or territory; insurance and endowment policies and endowment contracts; securities guaranteed by the United States, or any state or territory; securities issued by religious, educational, charitable or fraternal organizations, and building and loan and savings and loan associations.¹⁶²

The act is administered by the Securities and Exchange Commission.¹⁶³

245; *Securities & Exchange Commission v. Crude Oil Corp. of America*, 17 F. Supp. 164 (C. C. A.), *aff'd* 93 F. (2d) 844; *Securities & Exchange Commission v. Jones*, 15 F. Supp. 210, *aff'd* 79 F. (2d) 617.

¹⁵⁹ 15 USC 77 (a)-77bbbb.

¹⁶⁰ 15 USC 77e.

¹⁶¹ 15 USC 77f(d).

¹⁶² 15 USC 77c.

¹⁶³ 15 USC 41. See also *Penfield Co. v. Securities & Exchange Commission*, 143 F. (2d) 746, 154 A. L. R. 1027.

§ 231. **Regulation of Securities Exchanges.** Transactions in securities exchanges and over-the-counter markets are affected with a national public interest. It is necessary, therefore, to provide for regulation and control of such transactions in order to protect interstate commerce, the national credit, the Federal taxing power; to protect and make more effective the national banking system and Federal Reserve system, and to insure the maintenance of fair and honest markets. To provide for this regulation, Congress in 1934 adopted the Securities Exchange Act.¹⁶⁴ The act is administered by the Securities and Exchange Commission, which is an administrative body consisting of five members.¹⁶⁵

The act forbids brokers, dealers using the exchanges as well as the exchanges, to use the mails or any instrumentality of interstate commerce unless they are registered under the law or exempted by it. Registration is secured by filing a statement and securing the approval of the commission.¹⁶⁶ The provisions of the act include the supervision of margin requirements; restrictions on borrowing by members, brokers or dealers; the forbidding of manipulation of security prices; prohibiting the use of manipulative and deceptive devices; making illegal any transaction on any national securities exchange of any security not registered as required by statutes and regulations. Brokers and dealers carrying on over-the-counter sales are also prohibited from using the mails or the instrumentalities of interstate commerce unless they have registered with the Securities and Exchange Commission.¹⁶⁷

The purpose of the act is to prohibit the production of or the trading in securities by manipulative methods.¹⁶⁸

§ 232. **Protection of Labor.** In recent years the Federal government has accepted an increasing responsibility in the solution of labor problems. Its jurisdiction has been exercised under the power granted in the commerce clause; the provisions of the Constitution relating to the government of territories, including the District of Columbia; the exclusive authority of the Federal government in maritime affairs; and the vast influence exercised through its purchasing power.¹⁶⁹

¹⁶⁴ 15 USC 78a-78x.

¹⁶⁵ 15 USC 78d.

¹⁶⁶ 15 USC 78e.

¹⁶⁷ 15 USC 78g-78l.

¹⁶⁸ Securities & Exchange Commission v. Torr, 15 F. Supp. 315.

¹⁶⁹ Const. Art. I, § 8, cls. 3, 17; also Art. IV, § 3, cl. 2.

Pursuant to this power Congress has enacted a number of important laws. Among the principal enactments were: (a) The National Labor Relations Act, creating the National Labor Relations Board, establishing a procedure for collective bargaining and protecting workers in their full freedom of association, self organization and designation of representatives for the purpose of negotiating terms and conditions of employment;¹⁷⁰ (b) the Fair Labor Standards Act of 1938, regulating minimum wages and maximum hours in industries engaged in interstate commerce;¹⁷¹ (c) the Railway Labor Act, creating the National Railway Adjustment Board and the National Mediation Board, and providing for an orderly settlement of all disputes concerning rates of pay, rules and working conditions and the complete independence of employees in the matter of self organization;¹⁷² (d) Railroad Retirement Act providing for unemployment insurance and retirement compensation somewhat similar to that created by the Social Security Act for other than railway employees;¹⁷³ (e) the Merchant Marine Act of 1936, in addition to other merchant marine and shipping acts, creating the United States Maritime Commission, and regulating the employment, crews, wages, discharge and relief of seamen;¹⁷⁴ and (f) the Walsh-Healy Act regulating the hours and wages of manufacturing and industrial plants furnishing supplies to the Federal government.¹⁷⁵ These laws have been liberally construed by the Supreme Court of the United States and other Federal courts. The courts have uniformly held them to be within the powers of Congress, and they have sustained Congress in the definition of the fields of operation of the several acts.^{175a}

Many problems have arisen over the administration of the National Labor Relations Act. The courts have generally sus-

¹⁷⁰ 29 USC Chap. 7; *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 81 L. ed. 953.

¹⁷¹ 28 USC Chap. 8; *United States v. Darby*, 312 U. S. 100, 85 L. ed. 609, 132 A. L. R. 1430.

¹⁷² 45 USC Chap. 8.

¹⁷³ 45 USC Chap. 9. See also Monograph of Atty. Gen. Committee on Administrative Procedure, Part 8.

¹⁷⁴ 46 USC Chap. 18.

¹⁷⁵ 41 USC 35-45; *Perkins v. Lukens Steel Co.*, 309 U. S. 643, 84 L. ed. 997.

^{175a} *Jeffery De Witt Insulator Co. v. National Labor Relations Board* (C. C. A.) 91 F. (2d) 134, 112 A. L. R. 948; *United States v. Fred W. Darby*, 312 U. S. 100, 85 L. ed. 609; *Opp Cotton Mills, Inc. v. Administrator, Wage & Hour Division*, 312 U. S. 126, 85 L. ed. 624; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352.

tained the law and its administration, and have held that the provisions of the act extend not only to interstate commerce, but also to intrastate commerce when the intrastate activities so affect interstate commerce as to make them an appropriate subject of regulation by Congress.¹⁷⁶ The courts have also held that Congress may exclude from interstate commerce goods produced under substandard labor conditions, such as the employment of child labor;¹⁷⁷ that, since the adoption of the Norris LaGuardia Act, labor unions are not subject to prosecution; that they are not subject to restraint through the issuance of injunctions under the Sherman Anti-Trust Law,¹⁷⁸ and that the fundamental policy of the National Labor Relations Act is to safeguard the rights of self-organization and of collective bargaining.¹⁷⁹

Speaking of the right of labor to organize, Chief Justice Hughes declared: "That is a fundamental right. Employees have as clear right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."¹⁸⁰

Under the National Labor Relations Act, an employer may not intimidate or coerce his employees with respect to their self-organization and representation,¹⁸¹ but he may express his views

¹⁷⁶ United States v. Darby, 312 U. S. 100, 85 L. ed. 609.

¹⁷⁷ United States v. Darby, 312 U. S. 100, 85 L. ed. 609.

¹⁷⁸ United States v. Hutcheson, 312 U. S. 219, 85 L. ed. 788; Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. ed. 1311, 128 A. L. R. 1044.

¹⁷⁹ National Labor Relations Board v. Fansteel Metallurgical

Corp., 306 U. S. 240, 83 L. ed. 240, 123 A. L. R. 599.

¹⁸⁰ National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352.

¹⁸¹ National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352; Pittsburgh Plate Glass Co. v. National Labor Re-

on labor problems or policies so long as such utterances do not have a coercive effect upon his employees, or restrain them in their free choice of a representative for the purpose of collective bargaining.¹⁸² He may not deny jobs to men because of union affiliations.¹⁸³

§ 233. **Food and Drug Administration.** The Food and Drug administration enforces several acts of Congress, including the Food, Drug, and Cosmetic Act; the Tea Act; Import Milk Act; the Caustic Poison Act; and the Filled Milk Act. Until June 30, 1940, the administration was under the Department of Agriculture, but on that date it was transferred to the Federal Security Agency.¹⁸⁴

The Food, Drug, and Cosmetic Act prohibits the manufacture of adulterated or unbranded foods, drugs, devices and cosmetics; the adulteration or misbranding of such articles; or their introduction or delivery into interstate commerce. The Tea Act prohibits the importation of tea inferior to standard. The Import Milk Act defines the conditions under which milk and cream must be produced to be subject to importation, and prohibits such importation without a permit. The Caustic Poison Act prohibits the shipment in interstate commerce of any dangerous caustic or corrosive substance in a misbranded package or container suitable for household use. The Filled Milk Act prohibits the shipment of milk or milk products, which have been blended or compounded with any fat or oil other than milk fat.¹⁸⁵ The administration inspects and analyzes samples of the various products falling within the jurisdiction of these laws both at its field stations and at its laboratories in Washington in order to detect articles which have been adulterated or misbranded and to institute appropriate action.¹⁸⁶ The purpose of the administration of these acts is the promulgation and

lations Board, 313 U. S. 146, 85 L. ed. 1251.

¹⁸² National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 86 L. ed. 348.

¹⁸³ Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. ed. 1271, 133 A. L. R. 1217.

¹⁸⁴ United States Government Manual (Feb. 1942) 339.

¹⁸⁵ 21 USC 1-50, 61-64, 141-149; 15 USC 401-411; *Carolene Products Co. v. United States*, 323 U. S. 18, 89 L. ed. 15, 155 A. L. R. 1371.

¹⁸⁶ United States Government Manual (February 1942) 339.

protection of standards of identity and quality in the interest of the consumer.¹⁸⁷

The administration enforces its authority through seizure of the food, drugs, devices or cosmetics or other articles adulterated, misbranded, or otherwise not fit for use, through injunction proceedings in the district courts, or United States Courts of the Territories, or through criminal proceedings. An applicant for the introduction of a new drug may appeal from an adverse decision upon his application to the District Court of the United States. The administration has authority to promulgate regulations. An appeal from an order entered upon a hearing upon such regulations lies to the Circuit Court of Appeals.¹⁸⁸

§ 234. Other Major Regulatory Acts. Under the ever-increasing responsibilities of the Federal government, Congress has constantly increased and expanded the powers which it has exercised under the provision of the Constitution to regulate commerce. As our economic and social life has outgrown the boundaries of the states, the Federal government has been called upon to control and regulate many industries which previously were unsupervised or entirely within the control of the state governments. In order to meet these conditions and to solve the problems arising from them Congress, under its commerce power, has enacted many regulatory statutes in addition to those which have been discussed in preceding sections, and has created many Federal administrative commissions and boards, and has increased the powers and jurisdiction of those already existing. Among other major acts are the following:

- (a) Federal Water Power Act, establishing the Federal Power Commission consisting of the Secretary of War, Secretary of Interior and the Secretary of Agriculture. The powers of this commission relate to making investigations and the collecting of data concerning the utilization of our water resources.¹⁸⁹

¹⁸⁷ Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218, 87 L. ed. 724.

¹⁸⁸ Federal Food, Drug & Cosmetics Act, and General Regulation for its enforcement (June 29, 1939) Chaps. I-III, 21 USC 355,

371. See also Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218, 87 L. ed. 724; United States v. Dotterweich, 320 U. S. 277, 88 L. ed. 48.

¹⁸⁹ 16 USC 791.

- (b) Federal Trade Commission established for the purpose of promoting export trade and the prevention of unfair methods of competition in interstate commerce. The power of the commission is not confined to such practices as would be unlawful before it acted, but it may discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.¹⁹⁰
- (c) Commodity Exchange Act, adopted for the purpose of preventing excessive speculation in such commodities as wheat, cotton, oats, rice, corn, barley and many other agriculture products.¹⁹¹
- (d) Bituminous Coal Conservation Act of 1935, which established a national bituminous coal commission. The powers of the commission relate to the practices and methods used in distributing and marketing bituminous coal; to the regulation of prices, and to the elimination of unfair methods of competition. The commission is also authorized to conduct research designed to improve standards and methods in the mining, conservation and distribution of coal.¹⁹²
- (e) Act establishing United States Tariff Commission, an administrative body vested with executive and quasi-judicial powers. Its duties are to investigate the administration and fiscal and industrial effect of our customs laws and the tariff relations between United States and foreign countries; the effect of commercial treaties, preferential provisions, economic alliances; also the effect of export bounties, and the conditions, causes and effects relating to competition of foreign industries.¹⁹³
- (f) Packers and Stockyards Act was enacted to regulate interstate commerce in livestock, livestock products and meat food products. It prohibits every packer or poultry dealer from engaging in unjust discriminations; unreasonable preferences; creation of monopolies through apportioning

¹⁹⁰ 15 USC 41; Federal Trade Commission v. Standard Education Society, 86°F. (2d) 692, rev'd 302 U. S. 112, 82 L. ed. 141; Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 85 L. ed.

881 (Commission cannot prescribe unfair method used or to be used in intrastate sales).

¹⁹¹ 7 USC 1.

¹⁹² 15 USC 801-851.

¹⁹³ 19 USC 1330 et seq.

supplies; manipulation or controlling of prices; and apportioning territory or purchases and sales of any article in commerce. It treats the various stock yards of the country as great national public utilities to promote the flow of commerce from the ranges and ranches of the West to the consumers of the East. Violations of the act are tried before the Secretary of Agriculture, who exercises quasi-judicial functions. An appeal from the Secretary's order or finding may be taken to the Circuit Court of Appeals.¹⁹⁴

- (g) Federal Highway Act passed by Congress to empower the Secretary of Agriculture to co-operate with the state highway departments and the Secretary of the Interior in the construction and maintenance of the main parkways and the administration of the Federal-aid highway system. The fact that the Federal government has aided in the construction of state highways does not detract from the state's power to regulate and control these highways. The ownership, location and control of every state highway system is vested exclusively in the state.¹⁹⁵

§ 235. Foreign Commerce. The commerce clause of the Constitution places foreign commerce under the control of Congress. This clause, in so far as it involves international relations, is confirmatory of the inherent powers which the Federal government possesses as the necessary concomitant of nationality. These inherent powers are in fact much broader than those granted by the Constitution. They are equal to the right and power of other members of the international family.¹⁹⁶

Speaking of this form of commerce, Justice Johnson at an early date observed: "Power to regulate foreign commerce is given in the same words, in the same breath, as it were, with that over the commerce of the states and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The states are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the parts

¹⁹⁴ 7 USC 181-231.

¹⁹⁵ 23 USC 2 (a)-24 (a); *Single-tary v. Heathman* (Tex. Civ. App.), 300 S. W. 242.

¹⁹⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255.

of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity."¹⁹⁷ To which Chief Justice Hughes has added: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on commerce with the United States. If Congress saw fit to lay an embargo or prohibit altogether the importation of specified articles, no state by virtue of any interest of its own would be entitled to override the restriction. The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."¹⁹⁸

The provisions of the Neutrality Act adopted in 1939, and now partially repealed, will illustrate the power of Congress. This act provided: Upon the issuance of a proclamation by the President, declaring that a state of war existed between foreign states, which he should name, that (a) No American vessel might carry any passengers or any articles or materials to any state named in the proclamation; (b) No American citizen or American vessel might enter any combat area defined by the President, except under the rules prescribed by him; (c) No American vessel engaged in foreign commerce might be armed except as the President should designate; (d) No person within the United States might purchase, sell or exchange bonds, securities or other obligations of any state named in the proclamation.¹⁹⁹

Under the power to regulate foreign commerce, Congress has established a foreign agricultural service as provided in the Agricultural Adjustment Act.²⁰⁰ In 1922 it passed the China Trade Acts for the purpose of aiding the developments of markets in China.²⁰¹ It also maintains a Bureau of Foreign and Domestic Commerce, whose duties are: (a) To promote foreign and domestic commerce; and (b) to investigate and report upon commercial and industrial activities in foreign countries.²⁰²

¹⁹⁷ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (concurring opinion).

¹⁹⁸ *University of Illinois v. United States*, 289 U. S. 48, 77 L. ed. 1025.

¹⁹⁹ 22 USC 501-502, 521-527,

601, 611-616. Sections 2, 3, and 6 of this act relating to commerce, were repealed Nov. 17, 1941.

²⁰⁰ 7 USC 5901, 601-620 et seq.

²⁰¹ 15 USC 141-162.

²⁰² 15 USC 171-198.

§ 236. Imports and Exports. Congress possesses the sole power to regulate imports and exports. The Constitution places the following prohibitions upon the states:

"No state shall without the consent of the Congress lay imposts or duties upon imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of Congress."²⁰³

"No state shall without the consent of Congress lay any duty on tonnage."²⁰⁴

In the exercise of its control over imports and exports, Congress has enacted many different statutes. It has passed ten or more tariff bills. It has passed several custom administrative acts establishing collection districts, foreign trade zones and a United States Tariff Commission.²⁰⁵ In 1935 it enacted an Anti-Smuggling Act.²⁰⁶ Congress has established a Customs Court with jurisdiction over controversies arising in the administration of the customs regulations, including such questions as the classification of merchandise, rate of duty, fees, charges, etc. It has also provided a Court of Customs and Patent Appeals, with final appellate jurisdiction in the Supreme Court of the United States.²⁰⁷

Goods transported from one state to another are not imports, but goods brought into the United States from foreign countries or from the Philippine Islands come within this classification.²⁰⁸

§ 237. Trade-marks. There is no provision in the Constitution relating to trade-marks. The power of Congress to enact laws for their protection is derived from the commerce clause. It has provided that the owner of a trade-mark used in commerce with foreign nations, or among the several states, or with Indian tribes may obtain registration of such trade-mark by complying with the requirements prescribed in the act.²⁰⁹

²⁰³ Const. Art. I, § 10, cl. 2; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118.

²⁰⁴ Const. Art. I, § 10, cl. 3; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. ed. 370; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. ed. 417.

²⁰⁵ 19 USC 1-96.

²⁰⁶ 19 USC 483, 1401 et seq.

²⁰⁷ See Chap. 15, § 161, supra.

²⁰⁸ *Fairbanks v. United States*, 181 U. S. 283, 45 L. ed. 862; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252.

²⁰⁹ 15 USC 81.

A trade-mark is a distinguishable token devised or picked out with intent to appropriate it to a particular class of goods. It is not a right in gross or at large like a statutory copyright or a patent for an invention. The law of trade-marks is a part of the law of unfair competition. The right to a particular mark grows out of its use in trade and not its mere adoption. The owner may not, like the proprietor of a patented invention, make a negative or merely prohibitive use of it as a monopoly.²¹⁰

The power of Congress to register and protect trade-marks is limited to those in use in interstate and foreign commerce. The Trade-Mark Act of 1905, as amended, including the amendment of 1938, provides for the registration of trade marks with the Commissioner of Patents. There must be actual use of a trade-mark in order to secure its registration. Registration creates a presumption of validity only. It creates no substantive rights. Registration gives jurisdiction to the Federal courts in any action that may be instituted for its protection. The form of action would be an injunction against infringement. A certificate of registration remains in force for a period of twenty years, and may be renewed.²¹¹

State statutes also provide for the registration of trade-marks. A state, however, cannot limit or nullify monopolies created through trade-marks registered in accordance with an Act of Congress.²¹²

The purpose of registration of trade-marks by both the Federal government and the state governments is not only to protect the owner and his property, but also to protect the public from being deceived through a misleading claim that the article bearing the insignia is being manufactured by the owner of the trade-mark, when it is not. Thus it confers a benefit on the ultimate consumer in preventing confusion.²¹³

²¹⁰ United Drug Co. v. Theo Rectanus Co., 248 U. S. 90, 63 L. ed. 141; Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U. S. 203, 86 L. ed. 1381.

²¹¹ 15 USC 81-114.

²¹² Coca-Cola Co. v. Stevenson,

276 Fed. 1010; Coca Cola Co. v. State (Tex. Civ. App.), 225 S. W. 791.

²¹³ Esso Inc. v. Standard Oil Co. (C.C.A.) 98 F (2d) 1; Caron Corp. v. Maison Jeurelle-Seventeen, 26 F. Supp. 560.

CHAPTER 19

ADMINISTRATIVE PROCESS, DELEGATION OF POWER, TYPES AND PROCEDURE OF ADMINISTRATIVE AGENCIES

Although the administrative process had a different development and pursues somewhat different ways from those of the courts, they are to be deemed collaborative instrumentalities of justice and appropriate independence of each should be respected by the other.

—Justice Frankfurter

§ 238. Definition and Development. In a comprehensive sense the term administrative process is concerned with the general administration of the affairs of government. It means the activity of the state in the exercise of its powers, and is the process through which the will of the state is enforced. The process is common to all governments and includes the organization of administrative authorities; the definition of their powers, functions and duties; and the statement of the remedies afforded in case of a violation of duty, or the exercise of an excess power.

The development of the process in our Anglican system is one of evolution from the earliest Anglo-Saxon institutions. The process took definite form in the Curia Regis, or National or Great Council, instituted by William the Conqueror to give counsel and consent to legislative changes, and to express his judicial authority as the supreme head of the state. Out of this ancient council grew the great common law courts which for the first time developed a separation of governmental powers. The Court of Common Pleas was the popular and common court of the people. The Exchequer was the tribunal in which matters relating to royal revenues was settled. And the Court of King's Bench succeeded the Curia Regis, having jurisdiction of all pleas immediately concerning the King and the realm. This division of the administrative process, modified by the evolution of representative government in England and

America, and by the philosophy of Montesquieu, became the basis of the division of our government into legislative, executive and judicial departments in the Constitution of 1787.¹

In its more restrictive sense, administrative process has been defined as the law applicable to the transmission of the will of the state from its source to the point of application, involving, without differentiation, the legislative, executive and judicial powers, and excluding the general machinery of government from the field.² It refers particularly to the law which governs administrative authorities and which refers to the organization and functioning of such authorities.³ "Government could not be efficiently carried on," remarked Justice Epes of the Virginia Supreme Court of Appeals, "if something could not be left to the judgment and discretion of administrative officers to accomplish in detail what is authorized or required by law in general terms. Without this power legislation would become either oppressive or inefficient. There would be confusion in the laws, and, in an effort to detail and particularize, the law would miss sufficiency, both in provision and detail."⁴

§ 239. Relation of Process to Administrative Agencies. The most recent development of the administrative process in the United States is through administrative agencies. These agencies are the product of our political and economic development. They existed as a part of the executive department from the early days of the Republic, but later they became distinct organizations operating within the legislative and executive departments or quasi-independently of these departments. The period of the greatest development has been during the last half century. During this period, their growth has been due not only to the functioning of the normal processes of government, but in addition to the power wielded by strong groups which had grown up among our great industrial enterprises. In many cases the nation was dependent upon these enterprises for its economic existence, and they had become

¹ Taswell-Langmead, English Constitutional History (8th Ed.) Chap. V. See Adams, Council and Courts in Anglo-Norman England. See also Chap. 9, *supra*.

² Berle, The Expansion of American Administrative Law, 30 Harvard Law Review 430, 4 Selected

Essays on Constitutional Law, 120.

³ 1 Goodnow, Administrative Law, 7-8, 4 Selected Essays on Constitutional Law, 122 (note).

⁴ Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A. L. R. 604.

so powerful that they were able to challenge the authority of the Federal government as well as that of the states.⁵

"Modern administrative tribunals . . . have been a response to the felt need of governmental supervision over economic enterprise," wrote Justice Frankfurter, speaking of the origin and functions of these agencies, "a supervision which could effectively be exercised neither directly through self-executing legislation nor by judicial process. . . . Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities of transportation, communication and other essential public services."⁶

The first administrative agency was the postoffice department which was established in 1794 under the authority of Congress to establish post offices and post roads, and which now has charge of the extensive postal service of the United States.⁷ Since then, some one hundred forty other agencies, authorities, administrations and services have been created.⁸ The fields of the activities of these

⁵ Report of Atty. Gen. Committee on Administrative Procedure, 7-24 (discussion of the origin, development, and characteristics of the administrative process).

⁶ Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 84 L. ed. 656.

⁷ Const. Art. I, § 8, cl. 7; 5 USC Chap. 6.

⁸ Among the major commissions, including the date of their establishment, are the following: The Interstate Commerce Commission (1887); Federal Trade Commission (1914); Federal Communications Commission (1934); Federal Security Agency, administering the

Food, Drug and Cosmetic Act (1938); Federal Reserve System (1913); Bureau of the Comptroller of the Currency (1913); Secretary of Agriculture, administering the Packers and Stockyards Act (1921); National Labor Relations Board (1935); Securities and Exchange Commission (1934); Federal Power Commission (1930); Civil Aeronautics Authority (1938); Tennessee Valley Authority (1933); the Veterans Administration (1930); the Board of Tax Appeals (1924) now the Tax Court of the United States; Tariff Commission (1916); Bureau of Customs (1927); the Patent Office

commissions extend to telephone, telegraph and radio communications; to the protection of the public health; to unfair trade practices; to banking and finance; to the distribution of alcohol; and to the packing and stockyard interests.⁹ These agencies protect labor; securities buyers; users of electric energy; and the farmer in establishing grain standards, loaning him money, and in other ways. They administer the laws of taxation; the laws for the collection of customs; and the patent laws. They regulate all systems of interstate and foreign commerce by land, water, and air. One authority has listed forty major business relationships that the Federal government regulates and controls, and Justice Frankfurter has referred to them as satisfying the requirements of the public interest of the entire nation in the enjoyment of essential public services.¹⁰

The administrative process, as exercised by the administrative agencies of the Federal government, must be distinguished from the functions of the courts. "Unlike the courts, which are concerned primarily with the enforcement of private rights although public interests may be implicated," observed Justice Frankfurter, "administrative agencies are predominantly concerned with the enforcement of public rights although private interests may thereby be affected." This process is not confined to the judicial department. It represents a blending of the powers granted to the legislative, executive, and judicial departments rather than a separation

(1942); Railroad Retirement Board (1934); Maritime Commission (1936); and the Federal Deposit Insurance Corporation (1933).

⁹ 47 USC 1-609 (Wire and Radio Act); 21 USC 301-392 (Federal Food, Drug and Cosmetic Act); 15 USC 41 et seq. (Federal Trade Act); 12 USC 221 (Federal Reserve System); 636 et seq. (Farm Credit Administration); 1021 et seq. (Federal Intermediate Credit Banks, National Agriculture Credit Corporations); 1421 et seq. (Federal Home Loan Bank); 1751 et seq. (Federal Credit Unions); 1701 et seq. (National Housing); 1461 et seq. (Home Owners' Loan Act of 1933); 611 et seq. (Foreign Banking); 27 USC 201 et seq. (Federal Alcohol Administration);

7 USC 181 et seq. (Packers and Stockyards Act).

¹⁰ 29 USC 151 et seq. (National Labor Relations Act); 5 USC 77a, 77aa (Securities Act); 77b et seq. (Securities Exchange Act); 16 USC 831 et seq. (Tennessee Valley Authority); 7 USC 71-87 (Grain Standards Act); 12 USC 636 et seq. (Farm Credit Administration); 26 USC 1 et seq. (Internal Revenue Code); 19 USC 1 et seq. (Customs Duties); 35 USC Chaps. 1, 2 (Patent Office, Patents); 49 USC 1 et seq. (Transportation); 49 USC 401-481 (Civil Aeronautics Authority); Blachly & Oatman, Federal Regulatory Action and Control, 274; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 84 L. ed. 656.

of those powers. In fact, this process of blending had become so thoroughly established by 1925 that Chief Justice Taft asserted that complete separation and independence of these departments had never been attained or intended.¹¹

§ 240. Delegation of Administrative Power. The power of the administrative authorities is derived either directly from the Constitution or is delegated by the legislative department. Congress may declare its will and, after fixing a primary standard, devolve upon administrative officers, boards, and commissions the power to prescribe administrative rules and regulations. This authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the power of all departments, legislative, executive, and judicial. The action of the legislature in giving such rules and regulations the force and effect of laws does not violate the constitutional inhibition against delegating legislative powers. These rules and regulations are valid, however, only as subordinate to a legislative policy sufficiently defined by statute, and when found to be within the framework of such policy.¹²

The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and these essentials are preserved when Congress has specified the basic conditions of fact upon the existence or concurrence of which, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them call for the exercise of judgment in the administrative agency or officer or the formulation of subsidiary policy within the prescribed statutory framework.¹³

The theory of the delegation of Federal power was well expressed by Judge Baker of the Circuit Court of Appeals. "With

¹¹ Federal Communications Commission v. National Broadcasting Co. (dissenting opinion) 319 U. S. 329, 87 L. ed. 1374. See Chap. 11, § 115; Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 38 A. L. R. 131.

¹² United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 77 L. ed. 175; Opp Cotton Mills v.

Administrator, Wage & Hour Division, 312 U. S. 126, 85 L. ed. 624; State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563; Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446.

¹³ Yakus v. United States, 321 U. S. 414, 88 L. ed. 834.

the increasing complexity of human activities," he said, "many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi-legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. . . . And though the action of the commission in ordering desistance may be counted quasi-judicial on account of its form, with respect to power, it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court."¹⁴

Congress cannot, however, delegate its essential legislative functions. "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is invested," asserted Chief Justice Hughes. "In every case in which the question has been raised, the court has recognized that there are limits of delegation which there is no constitutional authority to transcend," he continued. "We think that section 9 (c) goes beyond those limits, as to transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." This requirement is not answered by the argument that the President has acted and will act for what he believes to be the public good.¹⁵

§ 241. Nature of Powers Delegated. The powers delegated to administrative authorities are those which cannot be exercised successfully by one of the departments. They are functions that require a blending of legislative, executive, and judicial powers; that must be performed by more expert bodies; that demand the use of discretion; that require promptness of action; or that will permit the development of a social and economic policy based on a broad

¹⁴ *Sears, Roebuck & Co. v. Federal Trade Commission* (C. C. A.) 258 Fed. 307, 6 A. L. R. 358.

¹⁵ See note 12, *supra*.

perspective without the delays, difficulties, or restrictions incident to court procedure or legislative action.

These functions relate to many different types of government service.

(a) *Benefactory.* They may be benefactory in nature, as where the government is offering some special privilege, grant or gratuity, or where it stands in the role of giver of gifts and benefits or the dispenser of bounties to individuals. Assistance and benefits granted to the aged; aid to the blind; farm and rural relief; emergency conservation work; unemployment relief; and pensions granted to disabled veterans are examples of these functions.

(b) *Government Business.* They may relate to government business, that is to the situations in which the government is seeking to enforce its rights and powers as a corporate state. It collects taxes, and customs duties, as well as enforces the payment of other revenue. It is in charge of immigration and controls public officers, and in World Wars I and II provided for the draft of citizens for military service.

(c) *Public Service.* They include public service, which is administrative; such as the services performed by the Post Office Department, the services relating to national parks, aid to highways, and the functions exercised in the development of dams and other government projects as well as public utilities conducted through governmental agencies.

(d) *Government Regulation.* They exist in situations where the government is seeking to regulate business and industry conducted by private individuals, because of public interest. This classification includes unfair methods of competition, reasonableness of rates and prevention of speculation; also, the regulation of the relationship between employer and employee; the regulation of interstate carriers; and the activities of the government in the stabilization of many industries of a national character.

(e) *Police Type.* Administrative functions are exercised by officers and agencies to protect the public health, morals and safety of the people; and for the prevention of fraud. These functions are of the police type. Such services are performed by the post office department in restricting the use of the mails. Another example is the services performed under the provisions of the Food, Drug and Cosmetic Act of 1938.

(f) *Controversies Between Individuals.* Administrative functions relate to controversies between individuals, especially those in which a definite social policy is involved. The National Labor Relations Act, enacted to settle disputes between the employer and his employees, and establishing the National Labor Relations Board is an example of the delegation of powers for this purpose. The National Mediation Board is another example of the use of the administrative process to settle controversies between individuals.¹⁶

§ 242. Federal Authorities Exercising Administrative Functions. The Federal authorities exercising administrative functions are found in the legislative and executive departments, although some of them exercise quasi-judicial powers.

Types of these authorities are as follows:

(a) *President and Heads of Departments.* The oldest of these groups are the President and the heads of the several executive departments. The President exercises administrative functions in the performance of his duties as the chief executive. These powers are such as those performed in connection with his fixing tariff schedules, his control over money and banking,¹⁷ his control of United States shipping under the Embargo Act of September 5, 1939¹⁸ and the power granted him to place an embargo upon the sale of arms in the Chaco under the Joint Resolution of Congress of May 28, 1934.¹⁹ Delegation of powers to the President is subject to the same limitations as those to other administrative agencies. Congress cannot abdicate to him its legislative functions or transfer to him power to perform delegated functions without laying down policies, establishing standards, and defining the limits within which he shall act. In holding invalid a delegation of power to the President, Chief Justice Hughes asserted that "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."²⁰

¹⁶ See Chap. 18, §§ 224-234, supra; Chap. 17, §§ 193, 201 and 208, supra.

¹⁷ 19 USC 1336, 1336 (i); 12 USC 95; 50 USC 5, 5a (Trading with Enemy Act).

¹⁸ United States Code Congress-

sional Service 1939, pages 1510-1518; 1940, page 187.

¹⁹ United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

²⁰ Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446.

The heads of the several executive departments also exercise administrative functions. Among these are the Postmaster General in the administration of postal affairs,²¹ the Secretary of the Interior in the administration of the General Land Office,²² and the Secretary of Labor in administering the Walsh-Healey Act in the protection of labor.²³ The Secretary of Agriculture, however, is entrusted with the greatest number of administrative duties, such as conferred by the Perishable Agriculture Commodities Act of 1930, and its amendments,²⁴ and by more than forty other acts of a similar nature.

(b) *Quasi-Independent Agencies Within Government Departments.* Administrative agencies have grown up within the several executive departments. These agencies have been established by statute rather than by any act of the department, and are quasi-independent. They are generally known as bureaus, commissions, divisions, councils and services. They are quasi-independent because they make their own rulings, decisions and orders independent of the head of the department, which have the force and effect of law.²⁵ These orders, decisions, and rulings are, however, appealable to the heads of the departments. In some cases reports are made to Congress. An example of this type of agency is the immigration and naturalization service, which is under the Commissioner of Immigration and Naturalization in the Department of Justice.²⁶ Other examples are the Federal Alcohol Administration in the Treasury Department;²⁷ and the Bureau of Marine Inspection and Navigation, the Bureau of Foreign and Domestic Commerce and the National Bureau of Standards in the Department of Commerce.²⁸

There are also quasi-independent divisions of departments, which are under an administrator, who is either the head of or assisted by a committee or commission. The administrator is generally appointed by the President with the advice and consent of the Senate and may be removed by the President. An example of this form

²¹ 39 USC Chap. 1-22.

²² 43 USC Chap. 1.

²³ 41 USC 35-45.

²⁴ 7 USC 551-568; also 7 USC 499a-499r.

²⁵ *Lum Sha You v. United States* (C. C. A.) Hawaii, 82 F. (2d) 83.

²⁶ 8 USC 102, 157.

²⁷ 27 USC 204.

²⁸ 5 USC 597; 46 USC 1 et seq.; 15 USC Chaps. 5, 8. See also Monograph Bureau of Marine Inspection & Navigation of Atty. Gen. Committee on Administrative Procedure, Part 10.

of agency is the Wage and Hour Division of the Department of Labor which administers the Fair Labor Standards Act of 1938. Under this act a committee for each industry engaged in commerce or in the production of commerce is appointed by the administrator. These committees investigate the minimum wage rates, as well as make other investigations and report to the administrator who, after notice to the parties interested, enters the final order. These orders are subject to review by the Circuit Court of Appeals.²⁹

(c) *Independent Regulatory Boards and Commissions.* Congress has established regulatory boards and commissions that are completely independent of the Executive Department, and through these agencies it has developed a system of regulation over many fields of the economic life of the nation. The first of these commissions was the Interstate Commerce Commission. Other independent boards and commissions are the Federal Power Commission,³⁰ the Federal Trade Commission,³¹ the Securities and Exchange Commission,³² the Federal Communications Commission,³³ the United States Maritime Commission,³⁴ the Board of Governors of the Federal Reserve Bank³⁵ and the National Labor Relations Board.³⁶

Many wide powers have been conferred upon these bodies, each agency being granted such powers as are necessary to effectively accomplish the purpose for which it was created. Among the powers common to all of them is the power to carry on investigations of subjects and conditions upon which Congress may legislate.³⁷ They may issue rules and regulations which have the force of law.³⁸ They are required to make annual reports to Congress in which they may recommend legislation.³⁹ They may issue orders legislative in nature.⁴⁰ In the performance of their administrative functions they are empowered to keep records and accounts, to make inspections and examinations, to gather evidence, to hear

²⁹ 29 USC 201-219.

³⁰ 16 USC 792.

³¹ 15 USC 41.

³² 15 USC 78d.

³³ 47 USC 151.

³⁴ 46 USC 1101.

³⁵ 12 USC 241.

³⁶ 29 USC 153.

³⁷ Monograph of Atty. Gen. Committee on Administrative Procedure

Part 3 (Federal Communications Commission) page 5; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047.

³⁸ 15 USC 77aa (Securities and Exchange Commission).

³⁹ 49 USC 21 (Interstate Commerce Commission).

⁴⁰ Securities & Exchange Commission v. Jones, 12 F. Supp. 210.

complaints, to conduct hearings, to make findings, and to enter statutory orders, which are final except for appeal to the courts.⁴¹ Their duties are predominantly quasi-legislative and quasi-judicial rather than political or executive.⁴²

These agencies are independent of the executive department, except that the President has the power of appointment. When Congress has provided that a member shall not be removed by the President, except for inefficiency, neglect of duty or malfeasance in office, the President's power of removal is limited to the said reasons. Speaking of the Federal Trade Commission, Justice Sutherland in a leading case remarked: "The language of the act, the legislative reports and the general purposes of the legislation as reflected by the debates all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. . . . The intent of the act is to limit the executive power of removal to the causes enumerated."⁴³ The terms of the members are frequently for seven years or more, which prevents the President from appointing an entire board within a single term of office.⁴⁴

(d) *Regulatory Authority with an Administrator.* In recent years agencies, headed by an administrator and having regulatory authority, have been established. The Civil Aeronautics Authority, with such administrator, appointed by the President with the advice and consent of the Senate, was authorized in 1938. The authority consists of five members appointed by the President who cannot be removed except for inefficiency, neglect of duty or malfeasance in office. Reports are made by this authority direct to Congress.⁴⁵ In the same year the Food, Drug and Cosmetic Act was amended adding additional powers to the authority enforcing

⁴¹ *Newfield v. Ryan* (C. C. A.) 91 F. (2d) 700; 49 USC 16 et seq. (Interstate Commerce Commission); *Rathbun v. United States*, 295 U. S. 602, 79 L. ed. 1611.

⁴² *Rathbun v. United States*, 295 U. S. 602, 79 L. ed. 1611.

⁴³ *Rathbun v. United States*, 295 U. S. 602, 79 L. ed. 1611.

⁴⁴ Securities and Exchange Commission, 7 years (15 USC 41); Interstate Commerce Commission, 7 years (49 USC 11); Federal Communications Commission, 7 years (47 USC 154); Board of Tax Appeals, 12 years (Internal Revenue Code, 26 USC 1102).

⁴⁵ 49 USC 421.

its provisions. It was a division of the Department of Agriculture until April 11, 1940, when the authority was transferred to the Federal Security Agency headed by an administrator. The statute has not provided for reports, but the message of the President to Congress on April 25, 1939 indicated that this agency as now set up is more directly under his control than is the Civil Aeronautics Authority.⁴⁶ Appeals from the final orders of both of these authorities may be taken directly to the Circuit Courts of Appeal.⁴⁷

(e) *Ex-Officio Commissions*. These commissions differ from the agencies just discussed in that they are composed of the heads of several executive departments, who serve in an ex-officio capacity. The most outstanding example of this form of commission is the Commodity Exchange Commission which consists of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General,⁴⁸ and which under the Commodity Exchange Act is charged with the regulation of commodity exchanges. Its functions are in the nature of administrative legislation when it issues rules and regulations, and in the nature of administrative adjudication when it issues cease and desist orders or orders fixing limits on trading under contracts of sale for future delivery.⁴⁹ Another example of this form of commission is the Foreign Trade Zone's Board, consisting of the Secretary of Commerce, the Secretary of Treasury and the Secretary of War. The function of this board is to grant to corporations the privilege of establishing, operating and maintaining foreign trade zones.⁵⁰ To these should be added the National Munitions Control Board consisting of the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of Navy and the Secretary of Commerce created under the Act of November 4, 1939 to control the manufacture, export and import of arms, ammunition and other implements of war.⁵¹

(f) *Authorities of the Nonregulatory Type*. Certain administrative agencies are of the nonregulatory type. This means that they are not concerned with the regulation of any economic activity. They were established to assist Congress and the

⁴⁶ 5 USC 133t (Reorganization Plan No. 1). See President's Message, Fourth Re-organization Plan dated April 11, 1940.

⁴⁷ 49 USC 646.

⁴⁸ 7 USC 2.

⁴⁹ 7 USC 6a; Board of Trade of Kansas City v. Milligan, 90 F. (2d) 855.

⁵⁰ 19 USC 81b.

⁵¹ 22 USC 245g (11).

President in formulating governmental policies; to function in situations where the government is seeking to carry on certain business of the government or in situations where the government is offering some special privilege or gratuity; to aid in administering relief, bonuses, and other benefits; to assist in performing certain offices of mediation and conciliation and the carrying on of other duties affecting the rights and interests of individuals. Examples of these agencies are as follows: The Veterans Administration, the duty of which is to administer the activities of the government relating to veterans;⁵² the National Mediation Board, which is concerned with the enforcement of the Railway Labor Act;⁵³ the Railroad Retirement Board, which is charged with the administration of the Railroad Retirement Act and the Unemployment Insurance Act;⁵⁴ the United States Employees Compensation Commission, which is charged with the administration of four acts providing for compensation for personal injury or disability for civil service employees and certain other government employees;⁵⁵ the Civil Service Commission, into whose care is entrusted the administration of the civil service laws, rules and regulations,⁵⁶ and the Bureau of the Budget and the General Accounting Office, which have charge of the Federal Budget and the general audit and accounting relating to all government affairs.⁵⁷

(g) *Government Corporations.* For more than a hundred years government corporations have been used as administrative agencies. They first appeared in the form of a national bank.⁵⁸ During World War I they appeared in the form of the War Finance Corporation and the United States Shipping Board Emergency Fleet Corporation in order that these organizations in corporate form might employ commercial methods and be free from existing auditing controls.⁵⁹ In more recent years this form of organization has been employed to perform functions similar to

⁵² 38 USC 11 et seq.

⁵³ 45 USC Chap. 8.

⁵⁴ 45 USC 228g.

⁵⁵ 5 USC Chap. 15. See also 33rd Annual Report of United States Employees Compensation Commission of November 15, 1939.

⁵⁶ 5 USC Chap. 12.

⁵⁷ 31 USC Chap. 1, 2.

⁵⁸ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

⁵⁹ *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 72 L. ed. 1. See also *United States Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co.*, 276 U. S. 202, 72 L. ed. 531.

those performed by several administrative agencies to carry on enterprises in which the government is interested and to act as credit-granting agencies.

The first class of corporations is engaged in developing public projects. These included the Inland Waterways Corporation, which was created for the purpose of carrying on the operation of the government-owned inland, canal and coastwise waterways system,⁶⁰ and the Tennessee Valley Authority, which was created to improve, operate and maintain properties on the Tennessee River, and generally to generate electric power and to sell it to municipalities, to nonprofit corporations, to rural co-operatives, to private concerns, and to other organizations for private use or for distribution to the public.⁶¹ These authorities operate as private corporations, and carry on their businesses as private enterprises. They enter into contracts with individuals, and these contracts are enforced as are contracts between individuals.⁶²

The second class of corporations are credit-granting agencies. This class includes such corporations as the Reconstruction Finance Corporation, which was created to loan government funds and to aid in financing agriculture, commerce and industry;⁶³ the Federal Home Loan Bank, which was organized to loan money to and to serve as a discount agency for building and loan associations, saving and loan associations, co-operative banks, homestead associations and insurance companies;⁶⁴ the Farm Credit Administration, consisting of the Production Credit Corporations and the Production Credit Associations⁶⁵ and the Home Owners Loan Corporation, created to provide emergency relief to home owners.⁶⁶

These corporations enjoy a greater independence than other forms of administrative agencies. They more closely approximate private enterprises. They are freed from the procedural technicalities and delays involved in the procedure of the other agencies. As a result their operations are conducted with greater efficiency and with greater speed. These corporations are subject

⁶⁰ 49 USC 151 et seq.

⁶¹ 16 USC Chap. 12A; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 21 F. Supp. 947; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. ed. 543; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688.

⁶² 16 USC 831c; *Inland Waterways Corp. v. Hardee*, 69 App. D. C. 268, 100 F. (2d) 678.

⁶³ 15 USC Chap. 14.

⁶⁴ 12 USC Chap. 11.

⁶⁵ 12 USC Subchap. IV.

⁶⁶ 12 USC 1461 et seq.; *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466.

to suit as corporate entities by private individuals. They have been held to be instrumentalities of the United States.⁶⁷

§ 243. **Administrative Review Authorities.** In order that the acts and decisions of subordinate agents and agencies may be controlled, administrative reviewing authorities have been established. These authorities generally have a more comprehensive grasp upon administrative problems. Their personnel are better trained, and are able to give the problems more careful study and to consider them in a more judicious attitude than a busy administrator. They consist of (a) independent appellate authorities; (b) heads of executive departments; (c) administrators of Federal agencies; (d) advisory appellate authorities; and (e) appellate authorities within administrative agencies.

(a) The independent appellate authorities are established by statute and are independent of the administrative agency. Their members are appointed by the President with the advice and consent of the Senate. Their jurisdiction is limited to administrative cases and controversies, and their procedure is similar to that of the courts. An appeal may be taken from these authorities directly to the courts. The best example of these authorities is the Tax Court of the United States, which consists of sixteen judges who serve for a period of twelve years. While the Board is not a court, its functions are quasi-judicial, and its decisions are subject to review by the Circuit Courts of Appeals.⁶⁸ Other examples are the Court of Claims,⁶⁹ the United States Customs Court,⁷⁰ and the Court of Customs and Patent Appeals.⁷¹

(b) Heads of the executive departments are frequently the final reviewing authorities of their departments. This authority arises when the secretary is made responsible by statute for the decisions of his department, even though such decisions may be made by subordinates. Under the Packers and Stockyards Act, the Secretary of Agriculture must enter the final orders and he is

⁶⁷ *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466. See Chap. 557, Public Laws 248 (the corporations are subject to certain budgetary control).

⁶⁸ Internal Revenue Code, 26 USC Subchap. A (1100 et seq.). See *Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.

S. 716, 73 L. ed. 918; *Lehigh Valley Trust Co. v. United States* (D. C.) 34 F. Supp. 839; *Helvering v. Gooch Milling & Elevator Co.* 320 U. S. 418, 88 L. ed. 139.

⁶⁹ 28 USC Chap. 7 (241-293).

⁷⁰ 19 USC 1518.

⁷¹ 28 USC Chap. 8 (301-311).

therefore the highest review authority. From his decision an appeal may be taken directly to the Circuit Court of Appeals.⁷² Another example is the National Bituminous Coal Division of the Department of the Interior, in which the Secretary of the Interior is the highest appellate authority.⁷³ The Postmaster General is the highest review authority of the Post Office Department, but there is no statutory provision for the judicial review of his decisions.⁷⁴

(c) Under the Reorganization Act, approved April 3, 1939, the President created the Federal Security Agency, the Federal Works Agency and the Federal Loan Agency, and transferred to each of these agencies a number of divisions, administrations, services and administrative authorities from other departments. In the case that, through statutory enactment or rules and regulations, the procedure of these agencies provided for an appeal to the head of a department or administrative agency, such appeal, after the reorganization, was taken to the administrator of the newly created Federal Agency. The most outstanding example was the authority administering the Food, Drug and Cosmetic Act of 1938, which was formerly included in the Department of Agriculture. Under the Reorganization Act, it was classified under the Federal Security Agency. The administrator of this agency became the review authority in the place of the Secretary of Agriculture, and an appeal lies to the Circuit Courts of Appeals from the final decision of the administrator the same as it lay from the Secretary of Agriculture.⁷⁵

(d) Advisory appellate authorities exist within departments and administrative agencies to advise and assist the head of the department, administrator or commission in considering details, in handling technical problems, and in forming opinions. These authorities make investigations, hold hearings, and make findings, reports and recommendations to the head of the department or to the administrator who makes the final decision. Such an authority is found in the State Department under the name of Board of Appeals and Review, in the Navy Department in the form of

⁷² 7 USC 193-194.

⁷³ 15 USC 829. See President's Reorganization Plan No. II, § 4 (a) and (b), effective July 1, 1939.

⁷⁴ Monograph of Atty. Gen. Committee on Administrative Procedure-

Part 12 (Post Office Department) pages 4, 15.

⁷⁵ 5 USC 133-133r; Reorganization Plan No. I; President's Message of April 25, 1939.

Examining and Retiring Boards, in the Commerce Department in the Business Advisory Council, and in the Department of Justice in the form of the Immigration Appeals Board. In all there are almost a score of such authorities in the several departments, services and other agencies.⁷⁶

(e) Administrative appellate authorities have been created within a number of the agencies. These authorities review decisions already made. These reviews are administrative in character, being a re-examination of all questions of law and fact in order that the agency may enter a correct final conclusion. For example, the function of the Board of Veterans Appeals is "to render final appellate decisions in all questions on claims involving benefits under the laws administered by the Veterans Administration."⁷⁷ Another authority of this class is the Board of Appeals in the Patent Office.⁷⁸

§ 244. Administrative Procedure. Administrative procedure is the practice followed by administrative agencies. It is the mode of beginning and conducting proceedings of an administrative character by these agencies. The procedure is less conventional than that of the courts. Speaking of the enforcement of public rights, Justice Frankfurter declared: "To no small degree administrative agencies . . . were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the modes by which business is done in the courts."⁷⁹

This procedure includes the forms of actions, requirements of notice, a fair hearing, the necessity of findings and the right and extent of judicial review which will be discussed in the following sections. Each agency has the authority to adopt a procedure suitable to its own operation and purpose, and as a result adminis-

⁷⁶ See Blachly and Oatman, *Federal Regulatory Action and Control*, 51. See also *United States Government Manual* (Spring, 1942) 281.

⁷⁷ See Monograph of Atty. Gen. Committee on Administrative Pro-

cedure, Part 2 (Veterans Administration) pages 57-58.

⁷⁸ 35 USC 7.

⁷⁹ *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 84 L. ed. 656.

trative procedure is not uniform. For the purpose of this discussion the subject has been divided into three classes, namely: (a) Procedure legislative in character; (b) procedure executive in character; and (c) procedure quasi-judicial in character. How general these classifications are may be judged by the fact that each agency may have from fifty to a hundred and even a thousand pages of rules and regulations governing its procedure. In fact, the rules and regulations of the Veterans Administration cover some four thousand pages.⁸⁰

(a) *Procedure Legislative in Character.* This procedure arises from the authority of administrative agencies to adopt rules and regulations for their operation and for the purpose of implementing and filling in the details of an Act of Congress. "Congress may declare its will," wrote Justice Sutherland, "and, after fixing a primary standard, devolve upon administrative officers the power to fill up details by prescribing administrative rules and regulations."⁸¹ The procedure followed in the adoption of these rules and regulations is comparable to that used by legislative bodies. Although hearings may be held for investigation and study, no notice or hearing is necessary as existing individual rights are not concerned. As in the case of statutes, rules and regulations do not affect rights until they are applied to some future action. The parties affected, therefore, are undefined, and it would be as absurd to require administrative agencies to give notice as it would be for Congress to do so.⁸²

(b) *Procedure Executive in Character.* Procedure, which is executive in character, is discretionary, and rests entirely upon the decision of the officer or agency making it. This procedure is used largely in the performance of the duties of the several executive departments of the government, and by agencies set up to function in cases where the government is offering some special privilege, grant or gratuity, or in situations where the government is seeking to carry on the business of the government as in the

⁸⁰ Federal Communications Commission v. National Broadcasting Co., 319 U. S. 239, 87 L. ed. 1374 (dissenting opinion); Monograph of Atty. Gen. Committee on Administrative Procedure, Part 2 (Veterans Administration) page 39.

⁸¹ United States v. Shreveport

Grain & Elevator Co., 287 U. S. 77, 77 L. ed. 175.

⁸² Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U. S. 176, 60 L. ed. 372; Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 101 A. L. R. 853.

matters of state, the control of public officers, taxation, customs duties, immigration and similar services.

This form of procedure follows no particular mold. It rests entirely with the administrator. It may consist of informal or formal hearings. It may be an examination, an investigation or an informal conference. It requires no notice, and there is no need to hold a hearing or to take evidence or to enter any findings. While it may indirectly affect or inconvenience an individual, it does not affect his individual rights, or deprive him of his property unlawfully. Since the courts will not lend their process to control executive or discretionary powers, they are not concerned with this form of procedure so long as it remains within the statutory requirements. "The statute which creates the asserted right commits to the director of the Bureau the duty and authority of administering its provisions and deciding all questions arising under it," asserted Justice Sutherland in considering whether the Director of the Veterans Bureau had acted arbitrarily, "and . . . we must hold that his decision of such questions is final and conclusive, and not subject to judicial review; . . . unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious."⁸³

(c) *Procedure Quasi-Judicial in Character.* This procedure relates to administrative action, which, although legislative in character, affects individual rights. In other words, it is quasi-judicial as well as legislative. The classification of the action depends not upon the character of the body but on the character of the proceedings.⁸⁴

This form of procedure is generally prescribed by statute, and applies to legislative orders authorized by Acts of Congress. It is used by the Federal Communications Commission in fixing or suspending charges or making refunds in the regulation of interstate and foreign commerce by wire or radio⁸⁵ and by the Interstate Commerce Commission in prescribing railroad or motor transportation fares, rates, charges or freights.⁸⁶ It is adjudicatory in

⁸³ *Silbershein v. United States*, 266 U. S. 221, 69 L. ed. 256. See *Dismude v. United States*, 297 U. S. 167, 80 L. ed. 561.

⁸⁴ *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150.

See also *American State Bank v. Jones*, 184 Minn. 498, 239 N. W. 144, 78 A. L. R. 770.

⁸⁵ 47 USC 151, 155.

⁸⁶ 49 USC 6.

nature, but differs from the ordinary adjudication of the courts in that it is not intended to settle ordinary controversies between individuals but is the part of a process of administering statutes of a regulatory nature. To this extent it is legislative in character. In the promulgation of regulations and rates for the future, no notice is necessary, provided a large number of persons were affected and notice would be impracticable.⁸⁷ Otherwise, there should be notice, and a fair hearing, findings of fact and an order.⁸⁸

This procedure also concerns bodies which are set up to regulate private business and individuals under the police power or other power of the government as is done by the Food, Drug and Cosmetic Act,⁸⁹ or the Federal Trade Commission,⁹⁰ or where the government is seeking to adjust individual controversies because of some important social policy being involved, as for example, the National Labor Relations Board.⁹¹ In these instances the due process clause requires notice, a fair hearing and findings of fact and a final order from which an appeal may be taken to the courts.⁹²

This procedure may be adjudicatory in character. This means that it resembles the same procedure in the courts in that there are parties, one of which is frequently the United States, and the decision as to rights and duties is based upon existing facts. It differs from court procedure, however, in that its main purpose is to administer certain statutes of a regulatory nature instead of settling controversies between individuals. "A hearing of this sort requiring the taking and weighing of evidence, determinations of fact based upon consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding," asserted Chief Justice Hughes. "Hence it is frequently described as a proceeding of a quasi-judicial character."⁹³ The procedure requires notice and full hearing, the making of findings of fact, and the entering of a

⁸⁷ See Federal Rules of Civil Procedure, Rule 23 (a); *Chamber of Commerce v. Federal Trade Commission* (C. C. A.) 13 F. (2d) 673; *George v. Benjamin*, 100 Wis. 622, 76 N. W. 619.

⁸⁸ See §§ 246-248, *infra*.

⁸⁹ 21 USC 301 et seq.

⁹⁰ 15 USC 41-58.

⁹¹ 29 USC 151, 153, 156.

⁹² See §§ 246-248, *infra*.

⁹³ *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288. See also *Payton v. McQuown*, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437.

final order.⁹⁴ It is employed in the administration of such acts as the Packers and Stockyards Act,⁹⁵ the Wire and Radio Act,⁹⁶ the Interstate Commerce Act,⁹⁷ and other regulatory acts.

§ 245. Forms of Administrative Action. There are five recognized forms of administrative action, namely: (a) Rules and regulations; (b) administrative orders; (c) administrative decisions; (d) executive proclamations and orders; and (e) stipulations, consent decrees and awards. Since administrative practice is not uniform, no one agency will use all of these forms. Each of the forms has its special field or purpose, and is used by the various agencies to accomplish the purpose which it serves. A knowledge of these forms is essential in order to understand the functions of administrative procedure.

(a) *Rules and Regulations.* Rules and regulations, although adopted by an administrative body, are essentially legislative in character. Justice Whitfield of the Supreme Court of Florida, defined them as being both legislative and administrative. "Authority to make rules and regulations to carry out an expressed legislative purpose, or for a complete operation and enforcement of a law within designated limitations is not an exclusively legislative power," he asserted. "Such authority is administrative in nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments."⁹⁸ Their purpose is to implement the statutes and to fill in the necessary details to make them apply to the citizen or corporation affected. As in the case of statutes they normally are concerned with future situations. They are general in nature, and are adopted to define rules and establish standards to govern classes of people and property rather than being designed to affect particular cases or specific circumstances.⁹⁹

The power to adopt rules and regulations is expressly granted by Congress. An example of this power is that granted to the Civil Aeronautics Authority in the following section of the Act:

⁹⁴ *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288.

⁹⁵ 7 USC 181 et seq.

⁹⁶ 47 USC Chap. 5; *Rochester Tel. Corp. v. United States*, 23 F. Supp. 634.

⁹⁷ 49 USC 1 et seq.

⁹⁸ *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639.

⁹⁹ *State ex rel. Chicago, M. & St. P. R. Co. v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523.

"The authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general rules, regulations and procedure, pursuant to and consistent with this act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this chapter." Rules and regulations which are clearly contradictory of an act of Congress cannot prevail. To be valid they must be consistent with the statute and must be reasonable.¹⁰⁰

As a general rule, statutes do not define the procedure necessary for the adoption of rules and regulations. In the absence of a specific requirement the procedure is optional. The investigation referred to in the above quotation is similar to the ordinary legislative investigation or inquiry. There may be informal hearings and consultations as well as other forms of investigation. In proceedings, which may be classified as adverse or in which the statute may require it, a formal hearing upon notice and with the opportunity to produce evidence is required. For example, the Federal Food, Drug and Cosmetic Act requires that "The Secretary, on his own initiative or upon the application of any interested industry or substantial portion thereof stating reasonable ground therefor, shall hold a public hearing upon a proposal to issue, amend or repeal any regulation. . . . The Secretary shall give appropriate notice of hearing . . . at the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the secretary shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Secretary shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based."¹⁰¹

Rules and regulations, when made in accordance with expressed or implied power of the agency, have the force of law. They are enforceable by the commission or board, and they are frequently

¹⁰⁰ 49 USC 425; *Helvering v. Sabine Transp. Co.*, 318 U. S. 306, 87 L. ed. 773; *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, 80 L. ed. 528; *Utah Hotel Co. v. Industrial Commission*, — Utah —,

151 P. (2d) 467, 153 A. L. R. 1176, 1188.

¹⁰¹ 21 USC 371 (e). For a general discussion of procedure in administrative rule-making, see Report of Atty. Gen. Committee on Administrative Procedure, -97-121.

enforced by the courts.¹⁰² There is no constitutional requirement that the validity of a regulation shall be tested in one tribunal rather than in another so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process. Generally they are not subject to challenge in a judicial proceeding prior to the time when they constitute a present invasion of private rights in the form of a penalty or otherwise. The Supreme Court, however, has held that under the Urgent Deficiencies Act, an injunction suit will lie to avoid a reasonably anticipated irreparable injury that may result from the legal consequences of an order or regulation promulgated by the Federal Communications Commission.¹⁰³

(b) *Administrative Orders.* The administrative order is the final adjudication of an administrative body. It differs from a rule or regulation in that the rule or regulation is used to prescribe a standard which shall be applied generally, while an order applies to a particular set of facts or to a specific situation. In the case of an order there are usually adverse parties making definite claims, while ordinarily there are no such parties in the promulgation of a rule or regulation. The rule or regulation is in the nature of a statute, while the order is in the nature of a final adjudication, decree or judgment. Orders may be procedural or legislative and, if they are, they are not subject to review by the courts. When they are judicial in effect, they are subject to review, but ordinarily the courts will not act until the administrative remedy provided by statute has been exhausted.¹⁰⁴

To be valid an order must be issued under the proper power and authority and it must be for an authorized purpose. It must con-

¹⁰² *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 87 L. ed. 411; *State ex rel. Chicago, M. & St. P. R. Co. v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523; *Ex parte Willman*, 277 Fed. 819.

¹⁰³ *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834; *Standard Computing Scale Co. v. Farrell*, 249 U. S. 571, 63 L. ed. 780; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 86 L. ed. 1563.

¹⁰⁴ See *Pacific States Box &*

Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 101 A. L. R. 853; *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 84 L. ed. 656; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 82 L. ed. 1408. See also Report of Atty. Gen. Committee on Administrative Procedure, 85; *Mitchell v. United States*, 313 U. S. 80, 85 L. ed. 1201; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. ed. 638;

form to the statute governing the particular proceeding, must be in the proper form, and must be in accord with the findings of the administrative agency.¹⁰⁵

Agencies which act generally through orders are the various commissions such as the Interstate Commerce Commission, the Federal Trade Commission,¹⁰⁶ Federal Communications Commission,¹⁰⁷ and the Commodity Exchange Commission.¹⁰⁸ It is also used by several boards such as the National Labor Relations Board,¹⁰⁹ and the National Railroad Adjustment Board.¹¹⁰ In addition, it is used by such agencies as the Federal Alcohol Administration of the Treasury Department,¹¹¹ and the Wage and Hour Division of the Labor Department.¹¹²

(c) *Administrative Decisions.* Administrative decisions are executive in effect. They involve the broad discretion of officers and are used by them in the exercise of executive functions in cases that do not involve guaranteed rights. They are used in the exercise of the benefactory powers of the government or in the field of public business such as the collection of revenue, the protection of the public welfare, the promotion of the industrial life of the nation, the exercise of the nation's police powers over shipping, navigable waters, highways and public lands, and in the exercise of the contractual powers of the Federal government. Administrative decisions do not constitute a justiciable case or controversy that may be appealed to the courts, unless there is clearly an abuse of power or other violation of rights in effect denying due process of law.¹¹³

Porter v. Investors Syndicate, 286 U. S. 461, 76 L. ed. 1226.

¹⁰⁵ Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 67 L. ed. 746; Akron, C. & Y. R. Co. v. United States, 261 U. S. 184, 67 L. ed. 605; Twin Falls Salmon River Land & Water Co. v. Caldwell, 266 U. S. 85, 69 L. ed. 178; Chicago, R. I. & P. R. Co. v. United States, 284 U. S. 80, 76 L. ed. 177.

¹⁰⁶ 49 USC 16; 15 USC 45.

¹⁰⁷ 47 USC 303, 401, 416.

¹⁰⁸ 7 USC 6a, 6b.

¹⁰⁹ 29 USC 160 (c); National

Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 85 L. ed. 930; Southern Steamship Co., v. National Labor Relations Board, 316 U. S. 31, 86 L. ed. 1246.

¹¹⁰ 45 USC 153.

¹¹¹ 27 USC 204.

¹¹² 29 USC 208.

¹¹³ Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013; Freund v. United States, 260 U. S. 60, 67 L. ed. 131; Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329, 77 L. ed. 341.

The authorities using the administrative decision are: (a) The several executive departments of the Federal government, including the Postmaster General;¹¹⁴ (b) government corporations such as the Tennessee Valley Authority¹¹⁵ and the Federal Deposit Insurance Corporation;¹¹⁶ (c) boards and commissions such as the National Munitions Control Board¹¹⁷ and the Civil Service Commission;¹¹⁸ and other agencies such as those included in the Federal Loan Agency, the Federal Works Agency and the Federal Security Agency, except the authority administering the Food, Drug and Cosmetic Act.¹¹⁹

(d) *Executive Proclamations and Orders.* Proclamations and orders are essentially executive in character. They rest entirely upon the discretion of the officer and are therefore not subject to review by the courts. They are issued by the President or other officer of the executive department. Proclamations and orders made or issued by the President have been discussed in a previous chapter under the powers and duties of the Chief Executive.¹²⁰ Secretaries of the several departments may also be authorized by Congress to issue proclamations and orders of an executive or administrative nature. For example, the Secretary of Agriculture, under the Agricultural Adjustment Act, may issue a proclamation and exercise extraordinary powers upon finding certain facts relative to the production, marketing and consumption of basic agricultural commodities,¹²¹ and the Secretary of the Treasury, with the approval of the President, may prescribe an emergency period during which banks that are members of the Federal Reserve System shall not transact any banking business except as permitted by him.¹²²

(e) *Stipulations, Consent Decrees and Awards.* These forms of administrative action relate to cases either pending or about to be filed in one of the courts of the United States. Stipulations have been used by the Federal Trade Commission to permit a corporation or other person accused by it of unfair trade practices,

¹¹⁴ Monograph of Atty. Gen. Committee on Administrative Procedure, Part 12 (Post Office Department).

¹¹⁵ 16 USC 831c.

¹¹⁶ 12 USC 264 et seq.

¹¹⁷ 22 USC 245g (11).

¹¹⁸ 22 USC 633 et seq.

¹¹⁹ 5 USC 133; Reorganization Plan No. I; President's Message submitting plan to Congress, April 25, 1939.

¹²⁰ Chap. 13, §§ 146-147, supra.

¹²¹ 7 USC 608.

¹²² 12 USC 95.

to dispose of its case before court action is begun by admitting the material facts and agreeing to cease and desist from such violations in the future. This power is exercised under Section 45 of Title 15 of the United States Code.

The consent decree is the settlement of a case pending in court. Upon the agreement of the Department of Justice, which is engaged in the prosecution of a civil or criminal proceeding or both, with the defendant, the court enters a decree. This form of procedure is used in anti-trust suits, resulting in injunctions providing for practicable working plans for the industries affected and frequently accomplishing results which could not be secured upon the trial of the case. If the defendant violates the decree he is subject to punishment for contempt by the court. Since the decree is entered by consent of the parties the record cannot be reviewed by an appellate court. These decrees in some cases have resulted from a combination of both the civil and criminal processes of the courts.¹²³

The administrative award is used to settle disputes between private carriers and common carriers and their officers, agents and employees, and is similar to the process of arbitration and award.¹²⁴ Such awards are made by the Board of Arbitration of the National Mediation Board and by the National Railroad Adjustment Board. The proceeding for awards is quasi-judicial. Notice is given to the parties, and they are heard in person and by counsel. A formal hearing is held and an award is made to the successful party. These awards are filed in the District Court and, through the procedure provided, become final as judgments.¹²⁵

§ 246. Notice. Notice, as the term is used in administrative proceedings, is the delivery or transmission, either actually or constructively to the party or parties who are or may be substantially affected by the administrative action, of information of such proceedings or a warning or announcement of the time, place and purpose of holding them. In some administrative proceedings notice is not necessary. In others it is necessary and must be given

¹²³ Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107. See also Chrysler Corp. v. United States, 316 U. S. 516, 86 L. ed. 1668.

¹²⁴ See 3 American Jurisprudence, 825.

¹²⁵ 45 USC 157-159; 45 USC 101-126.

when it is required by statute, and when it is required by the due process clause of the Constitution.

(a) *Notice Not Necessary.* Notice need not be given by agencies which are set up to aid the government in offering some special privilege, grant or gratuity. Since the government is dispensing these privileges rather than taking them from individuals, it can do so on such terms and conditions as it may fix. Neither is notice required by agencies carrying on the business of the government in exercising its sovereign functions and in such matters as taxation, matters of state, customs duties, and immigration, except perhaps when the personal freedom of an immigrant is involved. These agencies exercise powers which are purely discretionary or executive, and these powers are not subject to the due process clause.¹²⁶

Notice is not necessary when the agency exercises the administrative function to effectuate a definitely declared legislative policy. "Such regulation is purely a legislative function," declared the Court of Errors and Appeals of New Jersey, "and, even when exercised by a subordinate body, upon which it is conferred, the notice of hearing in judicial proceedings is not indispensable to a valid exercise of power."¹²⁷

Other cases in which no notice is required are when the order or regulation results from an investigation and no individual rights are affected; when the order is procedural only; when the complaint is served upon the adverse party together with a show cause order requiring appearance; when applications are passed upon favorably without a hearing, and when the adverse party voluntarily appears and submits to the jurisdiction of the agency.¹²⁸

(b) *Notice Required by Statute.* Notice may be required by statute and, when so required, must be given in accordance with its provisions. Such a provision was contained in the Federal Food, Drug and Cosmetic Act of 1938. "The Secretary shall give ap-

¹²⁶ *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U. S. 441, 60 L. ed. 372; *Bragg v. Weaver*, 251 U. S. 57, 64 L. ed. 135; *National Auto Service Corp. v. Barford*, 289 Pa. 307, 137 Atl. 601; *Yamataya v. Fisher*, 189 U. S. 86, 47 L. ed. 721.

¹²⁷ *State ex rel. Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176.

¹²⁸ See also *Federal Trade Commission v. Gratz*, 253 U. S. 421, 64 L. ed. 993.

propriate notice of the hearing," it provided, "and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon not less than thirty days after the date of the notice, except that the public hearing on regulations . . . may be held within a reasonable time, to be fixed by the Secretary, after notice thereof."¹²⁹

Many agencies, such as the Interstate Commerce Commission, require reasonable notice without specifying the form. In such cases the form of the notice is left to the discretion of the Commission.¹³⁰

(c) *Notice Under Due Process Clause.* Under the due process clause, notice is as imperative in administrative proceedings as it is in judicial, especially when the proceedings are in the nature of the adjudication of private rights. "Administrative as well as judicial proceedings are governed by the requirements of due process of law," wrote Chief Justice Orr of the Supreme Court of Illinois. "The object of this constitutional safeguard is to preserve the personal and property rights of a person against the arbitrary acts of public officials. The wielding of official power under our system of government must be by procedure which will protect persons against the ills arising out of the whims and caprice of officials."¹³¹ Administrative procedure, however, is governed by somewhat different principles than are required in judicial proceedings. "Administrative process of the customary sort is as much due process as judicial process," said the Michigan Supreme Court. "A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the government, in every instance where it touches the right of the individual citizen, shall be preceded by a judicial order or sentence after a hearing, would be to give to the judiciary a supremacy in the state, and seriously to impair and impede the efficiency of executive action."¹³² To this statement may be added that of the Court of

¹²⁹ 21 USC 371 (e); *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288; *Crowell v. Benson*, 285 U. S. 22, 76 L. ed. 598.

¹³⁰ 49 USC 12.

¹³¹ *People v. Belcastro*, 356 Ill. 144, 190 N. E. 301, 92 A. L. R.

1223; *Yamataya v. Fisher*, 189 U. S. 86, 47 L. ed. 721; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103.

¹³² *Weimer v. Bunbury*, 30 Mich. 201, 213, 214; *Bragg v. Weaver*, 251 U. S. 57, 64 L. ed. 135.

Errors and Appeals of New Jersey. "If the regulation undertaken," it held, "is arbitrary or unreasonable, and, in the case of rates and charges upon a business clothed with a public interest, confiscatory, relief may be had in the courts. A judicial review of administrative proceedings, on notice, satisfies the demand of the due process clauses." ¹³³

(d) *Adequacy of Notice.* The courts are divided as to when a notice shall be adjudged adequate. One line of decisions requires that the form of the notice or summons must conform to the statutory requirements,¹³⁴ and that deviation from these requirements will invalidate the proceedings.¹³⁵ An appearance, however, by the adverse party will remedy any defects in the notice the same as in any action in court.¹³⁶ The other line of cases holds that, while the notice given by the administrative body may fail to comply with the requirements of the statute, it may be adjudged sufficient if the parties affected had actual notice of the proceedings. For example, a notice mailed and improperly addressed, but actually received, was held sufficient.¹³⁷ Speaking of this subject, Justice Brandeis remarked: "All that is requisite in a complaint before the commission is that there is a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defense. The practice of the Federal Trade Commission in this respect, as in many others, is modelled on that which has been pursued by the Interstate Commerce Commission for a generation and has been sanctioned by this as well as the lower courts." ¹³⁸ In class suits notice should be given in some adequate way to all persons who will be substantially affected.¹³⁹ Frequently, notice is given by publication in an official bulletin, and this has been held sufficient especially when authorized by statute.¹⁴⁰

Congress has provided for the service through publication of all presidential proclamations and executive orders and other documents or classes of documents as may be authorized in the Federal

¹³³ State ex rel. Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116.

¹³⁴ Paine v. State, 156 Wash. 31, 286 Pac. 89.

¹³⁵ People v. Zoller, 337 Ill. 362, 169 N. E. 228.

¹³⁶ McKinley v. Lucas County, 215 Iowa 46, 244 N. W. 663.

¹³⁷ Wright v. Commissioner of

Internal Revenue (C. C. A.) 101 F. (2d) 30.

¹³⁸ Federal Trade Commission v. Gratz, 253 U. S. 421, 64 L. ed. 993 (dissenting opinion).

¹³⁹ Estes v. Union Terminal Co. (C. C. A.) 89 F. (2d) 768.

¹⁴⁰ Ottinger v. Arenal Realty Co., 257 N. Y. 371, 178 N. E. 665.

Register. As to the adequacy of the notice the act authorizing this form of service reads: "Whenever notice of hearing or of opportunity to be heard is required to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons within the continental United States."¹⁴¹ Appearing in this publication are such notices and orders as presidential proclamations and executive orders; orders of Bureau of Customs designating custom Districts; orders of food and drug administration promulgating amendments to regulations; orders of Interstate Commerce Commission establishing requirements to promote safety of operation of motor vehicles by private carriers; orders of the Federal Surplus Commodities Corporation, designating areas under the Surplus Food Stamp program and other regulatory orders of the Securities and Exchange Commission, Bituminous Coal Division of the Department of Interior and the Federal Communication Commission.¹⁴²

§ 247. Fair Hearing. Regulatory statutes and the due process of law clauses require that administrative tribunals shall, in addition to giving the proper notice, hold full and fair hearings before arriving at their decisions. "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions," asserted Chief Justice Hughes, "is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."¹⁴³ The hearing must be held before the final order is entered. The demands of due process do not require a hearing at the initial stage, or at any particular point or at more than one point so long as the requisite hearing is held before the final order becomes effective.¹⁴⁴

¹⁴¹ 44 USC 308.

¹⁴² See Federal Register, Vol. 5, No. 92, The National Archives of the United States.

¹⁴³ Morgan v. United States, 304 U. S. 1, 82 L. ed. 1129; Kessler v.

Strecker, 307 U. S. 22, 83 L. ed. 1082.

¹⁴⁴ Opp Cotton Mills v. Administrator, Wage and Hour Division, Department of Labor, 312 U. S. 126, 85 L. ed. 624; Inland Empire

The right to a hearing embraces the right to present evidence, and also to know the claims of the opposing party and to have a reasonable opportunity to meet these claims. It also includes the right to submit arguments, cross-examine witnesses, inspect documents and to offer explanations in rebuttal. Speaking of this right, Justice Lamar remarked: "The Commission is an administrative body, and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to examine witnesses, to inspect documents and to offer evidence in explanation and rebuttal. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient, information to support the finding." ¹⁴⁵

An administrative tribunal cannot base its findings upon information obtained by it outside of the official record.¹⁴⁶ If the commission desires to make its own investigations through experts or others, advice or information obtained from investigations or others, should be transmitted to all interested parties, and such parties given an opportunity to examine the commission's information at a future hearing. The right to a full hearing, however, does not include the right to rely on or to challenge evidence not offered or considered.¹⁴⁷

District Council v. Millis, 325 U. S. 697, 89 L. ed. 1877.

¹⁴⁵ Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 57 L. ed. 431. See also Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143; Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288; s. c., 304 U. S. 1, 82 L. ed. 1129.

¹⁴⁶ Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598.

¹⁴⁷ See *People ex rel. Binghampton Light, Heat & Power Co. v. Stevens*, 203 N. Y. 7, 96 N. E. 114; *F. W. Merrick, Inc. v. Cross*, 144 Okla. 40, 289 Pac. 267; *Lindsey v. Public Utilities Commission of Ohio*, 111 Ohio St. 6, 144 N. E. 729; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. ed. 1037.

The decision must be made by the commission or the commissioner and not by an examiner or other assistant. The statutes impose the duty of deciding questions of fact upon the administrative body or official and that duty cannot be fulfilled by merely accepting the recommendations of a subordinate. This rule does not eliminate the examiner-report system used by many of the commissions. Under this system, the examiner reviews the evidence and reports to the board or commission his proposed findings of fact and decision. This procedure is valid provided the findings and report are forwarded to all interested parties and they are afforded an opportunity of filing exceptions and of arguing them to the commission itself. In a recent case the court impliedly approved the procedure where the Secretary of Agriculture discussed the evidence with his subordinates and had read the briefs, finally deciding the case upon another issue.¹⁴⁸ A hearing is not necessary by officers, boards, or other bodies set up to offer special privileges, grants, or gratuities. In these cases the government may dispense its favors or gratuities on such grounds as it may see fit. When administrative bodies seek to carry into effect business of the government, no hearing is necessary either. In these cases, the government must be unhampered as far as possible.¹⁴⁹

A rehearing may be granted by an agency, but it is not a matter of right. It is a plea to the discretion of the agency making the order and not to that of the reviewing body.¹⁵⁰

§ 248. Necessity of Findings. The Supreme Court of the United States and several state courts have held that the administrative agency must enter findings if the case is to be subject to review by the appellate courts. "It must appear that there are findings, supported by evidence of essential facts," observed Chief Justice Hughes, speaking of a decision of the Interstate Commerce Commission. "The commission's failure specifically to report the facts," commented Justice Butler discussing a decision of the same commission, ". . . leaves the parties in doubt as to matters essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete state-

¹⁴⁸ *Morgan v. United States*, 304 U. S. 1, 82 L. ed. 1129. See also *Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288.

¹⁴⁹ See *Yamataya v. Fisher*, 189 U. S. 86, 47 L. ed. 721.

¹⁵⁰ *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 88 L. ed. 1420.

ments by the Commission, showing the grounds upon which its determinations rest, are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions."¹⁵¹ The findings must set forth the facts supporting the decision or order and must not be stated in the ultimate form of the language of the statute. They must cover the subsidiary facts which lead to the ultimate conclusion, instead of being confined to the ultimate conclusion itself.¹⁵²

Congress has required several of the commissions to enter findings. For example, the Federal Food, Drug and Cosmetic Act provides that "The Secretary shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order, detailed findings of fact on which the order is based."¹⁵³ The Supreme Court has required the Tax Court of the United States to go further. It must distinguish clearly between its findings of fact and its conclusions of law. Justice Jackson declared, "In view of the division of functions between the Tax Court and the reviewing courts, it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusions it reaches upon the law. In deciding law questions, courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." Most commissions, however, are not required by statute to enter formal findings. For example, the Interstate Commerce Act merely states that the report "shall state the conclusions of the Commission, together with its decision," and this provision relieves the commission from entering comprehensive findings. "The lack of such a complete statement," asserted Justice Brandeis, "while always regrettable, because unnecessarily increasing the labor of the reviewing court, is not fatal to the validity of the order."¹⁵⁴

¹⁵¹ *Florida v. United States*, 282 U. S. 194, 75 L. ed. 291; *Hall Co. v. United States*, 315 U. S. 495, 86 L. ed. 986; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023; *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 87 L. ed. 626; *Beaumont, S. L. & W. R. Co. v. United States*, 282 U. S. 74, 75 L. ed. 221. See also *Rozek's Case*, 294 Mass. 205, 200 N. E. 903; *Great Northern Ry. v. Department*

of Public Works, 161 Wash. 29, 296 Pac. 142.

¹⁵² *Great Northern Ry. Co. v. Department of Public Works*, 161 Wash. 29, 296 Pac. 142; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 85 L. ed. 1271.

¹⁵³ 2 USC 371 (e); *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218, 87 L. ed. 724.

¹⁵⁴ *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, 79 L. ed.

The findings of the commission need not be set forth in the formal way that is customary in trial courts. "Findings of fact, to be sufficient to support an order," said Justice Stephens of the Court of Appeals for the District of Columbia, "must include . . . basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred. It is not necessary for the commission to recite the evidence, and it is not necessary that it set out its findings in the formal style and manner customary in trial courts. It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the commission reached the ultimate facts and came to the conclusion. Our conclusions on this topic are, we think, confirmed by the decisions of the Supreme Court which considers what findings of fact are necessary in reports of the Interstate Commerce Commission." ¹⁵⁵

When an administrative agency is required to make findings as a condition precedent to an order, and it does not do so, the order is ineffective. The findings cannot be supplied by implication and by reference to the petition or other pleadings. ¹⁵⁶

§ 249. Judicial Review. Although there can be no judicial review in cases where Congress has foreclosed resort to the courts, and although the Supreme Court has often refused to furnish judicial review when no such right was provided by Congress, and although Congress may restrict judicial review to a single court, the supremacy of the law and the enforcement of constitutional rights demand that there shall be an opportunity to have some court, trial or appellate, decide whether an erroneous rule of law was applied by an administrative tribunal, and whether the proceeding in which facts were adjudicated was conducted regularly. ¹⁵⁷

587; *Dobson v. Commissioner of Internal Revenue* 320 U. S. 489, 88 L. ed. 248.

¹⁵⁵ *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 App. D. C. 282, 96 F. (2d) 554.

¹⁵⁶ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446.

¹⁵⁷ General Committee of Adjust-

ment, *Brotherhood of Locomotive Engineers, v. Missouri-Kansas-Texas R. Co.* 320 U. S. 323, 88 L. ed. 76; *Switchman's Union of North America v. National Mediation Board*, 320 U. S. 297, 88 L. ed. 61; *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834; *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 80 L. ed. 1033; *Jones*

An appeal may be taken from administrative agencies to the courts upon all justiciable questions. "The ultimate test of reviewability," asserted Chief Justice Stone, "is not to be found in an over-refined technique, but in the need of review to protect from irreparable injury threatened in the exceptional case by administrative rulings. . . . It is the substance of what the commission has purported to do or has done which is decisive," he said.¹⁵⁸

Federal statutes in many cases provide for a judicial review of administrative determinations by the Circuit Court of Appeals and by the Supreme Court of the United States. "But it is not the province of the courts," asserted Justice Reed, "to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action."¹⁵⁹ The Federal Food, Drug and Cosmetic Act will illustrate the most acceptable procedure for such review. It provides that "in a case of actual controversy as to the validity of any order . . . any person who will be adversely affected by such order . . . may file a petition with the Circuit Court of Appeals . . . for a judicial review of such order The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. . . . The findings of the Secretary (administrator) as to facts, if supported by substantial evidence, setting aside, in whole or in part, any such order of the Secretary (Administrator) shall be final, subject to review by the Supreme Court of the United States upon certiorari."¹⁶⁰ Other commissions from which appeals may be taken to the Circuit Court of Appeals include the Federal Power Commission; Civil Aeronautics Authority; Director Bituminous Coal Division;¹⁶¹ Securities and Exchange Commission;¹⁶² Com-

v. Securities & Exchange Commission, 298 U. S. 1, 80 L. ed. 1015. For a discussion of the functions of judicial review, see Report of Atty. Gen. Committee on Administrative Procedure, 76-79.

¹⁵⁸ *St. Joseph's Stockyards Co. v. United States*, 298 U. S. 38, 80 L. ed. 1033; *Stark v. Wickard*, 321 U. S. 288, 88 L. ed. 733; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 86 L. ed. 1563. See also *National Broadcast-*

ing Co. v. United States, 316 U. S. 447, 86 L. ed. 1586.

¹⁵⁹ *Gray v. Powell*, 314 U. S. 402, 86 L. ed. 301.

¹⁶⁰ 2 USC 371(e). See *Opp Cotton Mills v. Administrator of Wage & Hour Division*, 312 U. S. 126, 85 L. ed. 624. See also *Alton R. Co. v. United States*, 315 U. S. 15, 86 L. ed. 586.

¹⁶¹ 16 USC 824(d); 49 USC 646; 15 USC 833, 833c, 833d, 834 et seq.

¹⁶² 15 USC 79b et seq.

modity Exchange Commission;¹⁶³ National Labor Relations Board;¹⁶⁴ Interstate Commerce Commission;¹⁶⁵ and Federal Communications Commission.¹⁶⁶

Review in several instances may be had by the district court sitting both as a one-judge court and also as a three-judge court. In certain proceedings relating to legislative orders, penalty orders, orders relative to licenses and marketing agreements review may be had before the one-judge court. Commissions from which appeals may be taken are such as the Interstate Commerce Commission;¹⁶⁷ Federal Alcohol Administrator;¹⁶⁸ Commissioner of Internal Revenue;¹⁶⁹ the Secretary of Agriculture;¹⁷⁰ and the Secretary of Commerce.¹⁷¹ In other proceedings relating to legislative regulatory orders, cease and desist and enforcement orders, reparation orders, certificates, permits, approvals and grants, a review may be had by a three-judge court. Commissions from which these appeals may be taken are the Federal Trade Commission,¹⁷² the Interstate Commerce Commission¹⁷³ and the Secretary of Agriculture.¹⁷⁴

There is no review over legislative orders, procedural orders, administrative controlling orders, orders involving licenses, and orders relative to declarations and designations. These orders are such as are entered by the following commissions: Interstate Commerce Commission;¹⁷⁵ Federal Power Commission;¹⁷⁶ Securities and Exchange Commission;¹⁷⁷ Railroad Retirement Board;¹⁷⁸ and the Secretary of Labor.¹⁷⁹ In the case of a three-judge court, an appeal lies direct to the Supreme Court of the United States.¹⁸⁰

§ 250. Scope and Extent of Review. Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. "Because of historical differences in the relationship between administrative bodies and

¹⁶³ 15 USC 6a et seq.

¹⁶⁴ 29 USC 160 et seq.

¹⁶⁵ 5 USC 18 et seq.

¹⁶⁶ 47 USC 402.

¹⁶⁷ 39 USC 576.

¹⁶⁸ 27 USC 208.

¹⁶⁹ 27 USC 154-156.

¹⁷⁰ 7 USC 292, 499g, 608c, 852-854.

¹⁷¹ 15 USC 522.

¹⁷² 47 USC 312a.

¹⁷³ 49 USC 5, 20a, 304-312, 1238-1239.

¹⁷⁴ 7 USC 218d, 499h.

¹⁷⁵ 49 USC 5 et seq., 15 et seq. 19 et seq., 20 et seq., 320; *Zeffrin v. United States*, 318 U. S. 73, 87 L. ed. 621.

¹⁷⁶ 16 USC 798, 825.

¹⁷⁷ 15 USC 79 et seq., 780b.

¹⁷⁸ 45 USC 228j.

¹⁷⁹ 41 USC 39.

¹⁸⁰ See Chap. 16, §§ 182 and 183, *supra*.

reviewing courts and that between lower and upper courts," observed Justice Frankfurter, "a court of review exhausts its power when it lays bare a misconception of law and compels correction." ¹⁸¹

Even when resort to courts can be had to review a commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the commission's order becomes incontestable. For example, a determination of an agency must be accepted as final unless such determination is arbitrary or capricious, is tainted with fraud, mistake, or corruption, is unsupported by the evidence, is an abuse of discretion, violates the fundamental rules of due process of law, is contrary to statutory provisions, is made without adequate notice or a fair hearing, or the required findings, or the proceedings are otherwise irregular. ¹⁸²

Administrative determinations of fact, or inferences of facts, determinations which are made in the proper exercise of administrative, executive, and judicial, or legislative functions, and determinations which are the exercise of power or functions that are purely discretionary are binding and conclusive upon the courts. A court will not substitute its own discretion for that of administrative officers, who have kept within bounds of their administrative powers. The fact that a contrary inference is possible from the evidence does not allow the court to set aside one drawn by the administrative agency. However, if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise irreviewable discretion may become subject to correction. To successfully support its findings, an administrative agency must clearly disclose and adequately sustain the grounds upon which it acted. ¹⁸³

¹⁸¹ *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 86 L. ed. 1229.

¹⁸² *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 83 L. ed. 1147; *Marshall v. Pletz*, 317 U. S. 383, 87 L. ed. 348; *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163, 87 L. ed. 680; *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 87 L. ed. 626; *Dismuke v.*

United States, 297 U. S. 167, 80 L. ed. 561; *Rowley v. Chicago & N. W. R. Co.* 293 U. S. 102, 79 L. ed. 222; *United States v. Atkins*, 260 U. S. 220, 67 L. ed. 224; *Kwock Jan Fat v. White*, 253 U. S. 454, 64 L. ed. 1010.

¹⁸³ *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 87 L. ed. 1250; *Barringer & Co. v. United States*, 319 U. S. 1, 87 L.

§ 251. **Enforcement of Administrative Action.** Administrative agencies have no independent power of enforcing their rules and regulations, decisions, and orders. In most cases no enforcement is required. Either these administrative acts are self-executing or they are voluntarily obeyed. In cases where enforcement is required, these agencies depend upon the processes of the courts.

(a) *No Enforcement Required.* No enforcement is required in cases of the sovereign action of the government, or in an action that is benefactor or promotional on the part of the government or in an action that involves its lending powers. These actions relate to the discretionary powers of the officers, and do not require anything to be done by the individual. In these cases there is nothing to enforce. Examples of these cases may be found in the Post Office Department, the Commodity Credit Corporation, the National Youth Administration, and the Veterans Administration.¹⁸⁴

There are also certain rules and regulations and certain regulatory orders which require no enforcement. Such rules and regulations as are procedural merely require no external authority to enforce them,¹⁸⁵ except in the case of witnesses and the production of evidence which may be enforced in the District Court.¹⁸⁶

ed. 1171; Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218, 87 L. ed. 724; Securities & Exchange Commission v. Chenery Corp., 318 U. S. 80, 87 L. ed. 626; American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 81 L. ed. 142; Interstate Commerce Commission v. Hoboken Manufacturers' R. Co., 320 U. S. 368, 88 L. ed. 107; Equitable Life Assur. Soc. v. Commissioner of Internal Revenue, 321 U. S. 560, 88 L. ed. 927; Pope v. United States, 323 U. S. 1, 89 L. ed. 3; Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 87 L. ed. 1568; Arenas v. United States, 322 U. S. 419, 88 L. ed. 1363; United States v. Wabash R. Co., 321 U. S. 403, 88 L. ed. 827.

¹⁸⁴ See Monograph of Atty. Gen. Committee on Administrative Procedure, 17; Peoples Bank v. Gilson, 140 Fed. 1; Leach v. Carlyle, 258 U. S. 138, 66 L. ed. 511; 15 USC 713. See 5 USC 133t; Reorganization Plan No. I, dated July 1, 1939. See also Monograph of Atty. Gen. Committee on Administrative Procedure, Part 2 (Veterans Administration).

¹⁸⁵ See Discussion Monograph of Atty. Gen. Committee on Administrative Procedure, Part 3 (Federal Communications Commission), 61-80.

¹⁸⁶ Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047.

(b) *Enforcement through Fines, Penalties and Forfeitures.* Decisions and orders are frequently enforced through fines, penalties and forfeiture. For example, the decision of the Federal Food, Drug, and Cosmetic Administration may be enforced by seizing the questionable foods or drugs.¹⁸⁷ Customs officials may seize and confiscate goods in the payment of duties.¹⁸⁸ Internal Revenue such as income taxes, excess profits taxes and estate taxes may be collected by distraint. If the taxes are not paid the property may be seized and sold.¹⁸⁹

(c) *Enforcement through the Courts.* The final authority for the enforcement of the action of administrative agencies rests with the courts, and the processes controlled by them. This enforcement is accomplished (1) through appeal from administrative agencies direct to the courts;¹⁹⁰ (2) through civil suits, brought either by the administrative agency or by a person injured through disobedience to the order or by the United States;¹⁹¹ (3) through injunction suits brought by the administrative authority to have an order enforced¹⁹² which procedure includes the enforcement of cease and desist orders issued by such commissions as the Federal Trade Commission¹⁹³ and the Interstate Commerce Commission;¹⁹⁴ (4) through an action to obtain a declaratory judgment; and (5) by criminal actions to punish one alleged to be guilty of violation of the provisions of the order. For example, the penalty for sending obscene literature through the mails in violation of the regulations of the Post Office Department.¹⁹⁵

Administrative action may be reviewed or enjoined in certain cases through the use of the extraordinary writs. For example, the writ of habeas corpus is available to one whose bodily liberty

¹⁸⁷ 2 USC 334.

¹⁸⁸ 19 USC 482, 494.

¹⁸⁹ 26 USC 276 (c), 874b, 875, 1012, 3791 (b3).

¹⁹⁰ See § 12, supra.

¹⁹¹ 49 USC 16 (Interstate Commerce Commission); Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567; Columbia Broadcasting System v. United States, 316 U. S. 407, 86 L. ed. 1563 (injunction against order or announcement of policy of Federal Trade Commission); National

Broadcasting Co. v. United States, 316 U. S. 447, 86 L. ed. 1586.

¹⁹² See 49 USC 16 et seq.; Pittsburgh & W. V. R. Co. v. United States, 6 F. (2d) 646; Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 2 L. R. A. 289.

¹⁹³ 15 USC 45.

¹⁹⁴ 49 USC 16 et seq.

¹⁹⁵ See Chap. 15, § 164. See also Report of Atty. Gen. Committee on Administrative Procedure, 81; 18 USC 334.

has been unlawfully restrained.¹⁹⁶ The writ of prohibition may be used to prevent an agency from exceeding its statutory jurisdiction.¹⁹⁷ A writ of mandamus may be employed to review the failure of an officer or agency to perform duties which are required by law.¹⁹⁸

§ 252. **Defects of the Administrative System.** The chief defect charged against the administrative system is that it tends toward administrative absolutism, a doctrine which defines law as, "Whatever is done officially," and hence administrative law would be the actual course of the administrative process instead of a body of authoritative grounds and guides to decision as defined by our jurisprudence. Although the administrative process has been well executed by many of the agencies whose powers, duties, and procedure have been well defined, there are tendencies which have been subject to criticism.¹⁹⁹

Among these tendencies are the following:²⁰⁰ (a) A tendency to decide without hearing, or without hearing one of the parties, (b) a tendency to decide on the basis of matters not before the tribunal or on evidence not produced;²⁰¹ (c) a tendency to make decisions on the basis of pre-formed opinions and prejudices;²⁰² (d) a tendency to consider the administrative determining function one of acting rather than deciding; to apply to the determining function the

¹⁹⁶ See generally 25 American Jurisprudence, 139.

¹⁹⁷ See generally 42 American Jurisprudence, 137 et seq.; Whitten v. California State Board of Optometry, 8 Cal. (2d) 444, 65 P. (2d) 1296, 115 A. L. R. 1.

¹⁹⁸ People, ex rel. Drake v. University of Michigan, 4 Mich. 98; United States ex rel. Greathouse v. Dern, 289 U. S. 352, 77 L. ed. 1250; Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160, 71 L. ed. 978.

¹⁹⁹ See generally Report of the Atty. Gen. Committee on Administrative Procedure, 191-251.

²⁰⁰ Subdivisions (a) to (j), Report of Committee consisting of Roscoe Pound, Walter F. Dodd, James R. Garfield, O. R. McGuire

and Robert F. McGuire of American Bar Association (1938), 63 Am. Bar Ass'n Rep. 346. See also addresses of Hon. Francis Biddle, Attorney-General, and of Roscoe Pound, 27 Am. Bar Ass'n Jour. 660-678.

²⁰¹ Saxton Coal Min. Co. v. National Bituminous Coal Commission (C. C. A. D. C.) 96 F. (2d) 517; 63 Am. Bar Ass'n Rep. 346. See Opinion of Justice Cardozo in United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 79 L. ed. 1023, in which he said, "In brief, a schedule of lowered tariffs has been cancelled though the facts that control the validity of the reduction have yet to be determined"; 63 Am. Bar Ass'n Rep. 347.

²⁰² 63 Am. Bar Ass'n Rep. 349.

methods of the directing function;²⁰³ (e) a tendency to disregard jurisdictional limits and seek to extend the sphere of administrative action beyond the jurisdiction confided to the administrative board or commission. Also there is a tendency to extend the regulatory power of the administrative agency;²⁰⁴ (f) a tendency to mix up rule-making, investigation, prosecution, the advocate's function, the judge's function, and the function of enforcing the judgment, so that the whole proceeding from end to end is one to give effect to a complaint.²⁰⁵

Defects, due to the lack of uniform procedure among the agencies, have been listed as threefold: (a) The respective administrative agencies give little heed to, and are little assisted by, the decisions of other administrative agencies or by decisions of the courts applicable to such agencies; (b) the courts are placed at considerable disadvantage because they must verify the basic statutes of all decisions relating to other administrative agencies which are cited to them, thus slowing up the writing of opinions in particular cases; (c) individuals and their attorneys are at a disadvantage in the presentation of their administrative appeals, with a result that there is a tendency to emphasize the importance of the judiciary in the administrative process.²⁰⁹

Considering the defects of our administrative system from a general viewpoint, a congressional report emphasized the importance of controlling administrative action. "Throughout this period from 1787," it read, "the prime consideration and emphasis have been on strengthening the powers of the Federal government so as to regulate and control the governed with practically no consideration being given to providing means and methods whereby the governors could be governed and the regulators could be regulated. The time has come when some of these regulators consider themselves above the statutes and when they show contemptuous disregard for both Congress and the courts. Unless this country is to become first a parliamentary and then a totalitarian government, with the states reduced to mere police provinces, and with both the legislative and judicial branches of our government dominated by the administrative agencies of the government, these administrative agencies must be required to both observe the terms

²⁰³ 63 Am. Bar Ass'n Rep. 349.

²⁰⁴ *Doran v. Eisenberg*, 30 F. (2d) 503; 63 Am. Bar Ass'n Rep. 350.

²⁰⁵ See note 198, *supra*.

²⁰⁹ See Report No. 1149 to accompany H. R. 6324, 76th Cong., 1st Sess.

of the statutes and to exercise good faith in their administration of such statutes." ²¹⁰

§ 253. **Administrative System, an Evolution.** Our administrative system is developing through the processes of evolution. The Constitution of 1787 made no provision for an administrative service, except by implication. Obviously the framers contemplated the establishment of administrative or executive departments by Acts of Congress. The Judiciary Act of 1789 created a judicial system, and the postal system was provided for by an Act of Congress in 1794. In 1796 a national bank was created and in 1855 the Court of Claims was established. It was not, however, until 1887 that our administrative system as it is known today took definite form. In that year the Interstate Commerce Commission was created to enforce the provisions of the Interstate Commerce Act, and since that time more than one hundred forty commissions have been established with power to regulate many phases of our economic life.

This evolutionary process is continuing. The inchoate condition of these administrative agencies is the best evidence that they are still developing, especially in their procedure and in their relation to the courts. The development is being carried on by three agencies. In the first place, many of the agencies are constantly amending their rules and regulations to provide for notice, a fair hearing, findings, and final order more comparable to judicial proceedings.²¹¹ In the second place, Congress continues to enact such statutes as the Food, Drug and Cosmetic Act,²¹² the Wire and Radio Communications Act ²¹³ and the Civil Aeronautics Act,²¹⁴ in which acts the functions of the administrative agency are more specifically defined and their procedure is more in accord with the procedure of the courts. A few years ago it appointed an able committee which worked with the Attorney General in studying the practice and procedure of the various agencies and which committee in its report suggested many constructive improvements and reforms.²¹⁵

²¹⁰ Senate Report No. 442 on the Logan-Walker Bill, 76th Cong.

²¹¹ See Monograph of Atty. Gen. Committee on Administrative Procedure, Part 12 (Post Office Department) 17.

²¹² 21 USC 301-392.

²¹³ 47 USC Chap. 5.

²¹⁴ 49 USC 401-481.

²¹⁵ Under Senate Resolution No. 248, dated April 22, 1940, a committee of distinguished teachers was appointed, and an able staff, with Walter Gellhorn as director, has prepared a series of monographs on administrative procedure. Un-

Finally, the Supreme Court has required the various agencies to maintain standards that were in accord with judicial traditions. "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance," declared Chief Justice Hughes, "and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary it is in their manifest interest. For . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished tradition embodying the basic concepts of fair play."²¹⁶

The evolution of administrative agencies has proceeded to the point where the Supreme Court has recognized them as related instrumentalities of justice. Speaking of this relationship, Justice Stone in a leading case commented: "In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never encouraged or aided by the other in the attainment of the common aim."²¹⁷

The final purpose of the system is to develop a body of administrative law in accordance with our common law traditions, and that is the goal toward which we are going. "It is believed," ran a report to Congress, "that we may safely trust this matter to the wisdom of all concerned to the end that there may be developed in this

der date January 24, 1941, the Attorney General filed the report of this committee with Congress, and it is now published by the Government Printing Office as Document

No. 8 of the 77th Congress.

²¹⁶ Morgan v. United States, 304 U. S. 1, 82 L. ed. 1129.

²¹⁷ United States v. Morgan, 307 U. S. 183, 83 L. ed. 1211.

country a body of administrative law in accordance with the received common law traditions with both the administrative agencies and the courts jealously concerned to remain within their respective allotted spheres—both being anxious to interpret and apply the constitutional statutes as enacted by the elected representatives of the people.”²¹⁸

When this body of law is developed into a definite form, it will constitute in effect a fourth division of our constitutional structure.²¹⁹

²¹⁸ Senate Report No. 442 on Logan-Walter Bill, 76th Cong. (1939).

²¹⁹ See Chaps. 4-8, *supra*.

PART V

CONSTITUTIONAL LIMITATIONS AND GUARANTIES

CHAPTER 20

PROTECTION OF CIVIL RIGHTS

Civil liberties had their origin and must find
their ultimate guaranty in the faith of the people.

—Justice Jackson

§ 254. **Definition, Natural Rights—Civil Rights.** Rights may properly be divided into two classes, namely, natural rights and civil rights.

Natural rights are those which are necessarily inherent, rights which are innate, and which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation.

Civil rights are those which are the outgrowth of civilization, and which arise from the needs of civil, as distinguished from barbaric communities. They are defined and circumscribed by such positive laws as are necessary to the maintenance of organized government. The term comprehends all rights which civilized communities undertake, by the enactment of such laws, to prescribe, protect and enforce.¹ They include the rights to acquire property; to enjoy freedom of contract; the right to an education; the right to obtain justice freely; the right of trial by jury; and similar rights. They also include political rights such as the right of suffrage, the right to hold office and the right to participate in the administration of governmental affairs. Everyone, unless legally deprived of them, has the enjoyment of these rights.²

¹ Byers v. Sun Sav. Bank, 41 Okla. 728, 139 Pac. 948, Ann. Cas. 1916 D 222.

² 2 Bouv. Law Dict. 2961-2962.

§ 255. **Right of Liberty.** Liberty means freedom from external restraint or compulsion. It is the power to do what one pleases, to do everything that is permitted by law. It embraces the right of a citizen to be free in the enjoyment of all his faculties; and to be free to use them in all lawful ways.³ Justice McReynolds, speaking of the liberty guaranteed by the Fourteenth Amendment, declared: "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."⁴ This right is one of the most important guaranteed by the Constitution. It cannot be passed over lightly nor encroached upon, even though the result sought is a beneficent one or is inspired by the best-intentioned effort.⁵

Liberty, however, does not signify unrestrained license to follow the dictates of an unbridled will. The liberty of every individual is subject to reasonable restraints made by general law for the public good. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community," observed Justice Hughes in holding that a state might enact legislation under its police power.⁶

§ 256. **Religious Liberty.** Religious liberty is guaranteed under the First and Fourteenth Amendments. The First Amendment provides:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The Fourteenth Amendment placed a prohibition upon the states, denying them the right to deprive any person of life, liberty, or property without due process of law or to abridge his privileges or

³ *Allegeyer v. Louisiana*, 165 U. S. 189, 41 L. ed. 832; *Jacobson v. Massachusetts*, 197 U. S. 26, 49 L. ed. 643, 3 Ann. Cas. 765; *People v. Gillson*, 109 N. Y. 398, 17 N. E. 343, 4 Am. St. Rep. 465.

⁴ *Myer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

⁵ *Ex parte Arata*, 52 Cal. App. 380, 193 Pac. 814.

⁶ *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328; *Commonwealth v. Libby*, 216 Mass. 356, 103 N. E. 923, Ann. Cas. 1915 B 659.

immunities. It also secured all persons against the abridgement of the fundamental personal rights and liberties which cannot be denied them without violating the principles and justice which lie at the base of our civil and political institutions.⁷

Discussing this prohibition, Justice Roberts observed: "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religions, organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is an absolute one but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . A state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guaranty." Any state law, therefore, as well as any Federal law, respecting an establishment of religion, or prohibiting the free exercise thereof, is invalid.⁸

The guaranty provided by these amendments has been further defined by provisions of Federal and state constitutions and by the decisions of the courts. The establishment of a religion or a state church is forbidden and no person against his consent can be compelled to attend or to support any church.⁹ Public money cannot be appropriated or used for the support of any church or religious body,¹⁰ but religious societies may be incorporated and may be empowered to acquire and possess property and otherwise to manage their affairs,¹¹ and religion generally may be encouraged so long

⁷ *DeJonge v. Oregon*, 299 U. S. 353, 81 L. ed. 278; *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 1093; *Douglas v. Jeannette*, 319 U. S. 157, 87 L. ed. 1324.

⁸ *Cantwell v. Connecticut*, 310 U. S. 296, 84 L. ed. 1213, 128 A. L. R. 1352; *United States v. Ballard*, 322 U. S. 78, 88 L. ed. 1148; *Hamilton v. Regents of University of California*, 293 U. S. 245, 79 L. ed. 343.

⁹ *Vidal v. Girard's Executors*, 2 How. 127, 11 L. ed. 205. See *State ex rel. Temple v. Barnes*, 22 N. D. 18, 132 N. W. 215, 37 L. R. A. (N. S.) 114, Ann. Cas. 1913 F 930.

¹⁰ See *Quick Bear v. Leupp*, 210 U. S. 50, 52 L. ed. 954.

¹¹ *Baptist Church v. Witherell*, 3 Paige (N. Y.) 296, 24 Am. Dec. 223.

as there is no discrimination requiring the support of a particular church or mode of worship.¹² No man's conscientious scruples should be violated by the laws; but exemption from military service on account of scruples against bearing arms rests upon Acts of Congress rather than upon a constitutional guaranty.¹³ No religious test shall ever be required as a qualification to any office of public trust. This is a provision of the Federal Constitution, and a similar provision is found in most state constitutions.¹⁴ Neither may a state enforce a statute forbidding solicitation of support for any charitable, religious or philanthropic cause unless such cause shall have been approved by a state officer named in the statute, because such condition lays a forbidden burden upon the exercise of liberty under the Constitution.¹⁵

The guaranty does not prohibit: (a) The enactment of Sunday laws, such as the prohibiting of the playing of baseball,¹⁶ or declaring unlawful the operation of moving picture theatres,¹⁷ the forbidding of ordinary trade, traffic or labor, or enforcing quiet upon the public streets.¹⁸ (b) The enactment of statutes by the states defining and punishing blasphemy.¹⁹ (c) The enactment of statutes exempting churches, schools, and other property of religious organizations from taxation, but there can be no discrimination in such exemption in favor of or against any sect or religious organization.²⁰ (d) The public recognition and encouragement of religion, where no restraint is put upon the conscience of any individual.²¹ (e) The requiring of persons, marching in a parade in

¹² *Gabel v. City of Houston*, 29 Tex. 335.

¹³ *United States v. Macintosh*, 283 U. S. 605, 75 L. ed. 1302.

¹⁴ Const. Art. VI, cl. 3; *State v. Bird*, 253 Mo. 569, 162 S. W. 119, Ann. Cas. 1915 C 353. For example, see Constitution of Delaware, Art. I, § 2; Constitution of Alabama, Art. I, § 3; Constitution of Mississippi, Art. III, § 18; Constitution of Oregon, Art. I, § 4; Constitution of Texas, Art. I, § 4.

¹⁵ *Cantwell v. Connecticut*, 310 U. S. 296, 81 L. ed. 1213; *Largent v. Texas*, 318 U. S. 418, 87 L. ed. 873; *Jamison v. Texas*, 318 U. S. 413, 87 L. ed. 869.

¹⁶ *Hiller v. State*, 124 Md. 385, 92 Atl. 842.

¹⁷ *Rosenbaum v. State*, 131 Ark. 251, 199 S. W. 388, L. R. A. 1918 B 1109.

¹⁸ *State ex rel. Temple v. Barnes*, 22 N. D. 18, 132 N. W. 215, 37 L. R. A. (N. S.) 114, Ann. Cas. 1913 E 930; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707.

¹⁹ *State v. Mockus*, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871.

²⁰ See Chap. 28, § 354, *infra*.

²¹ *Gabel v. City of Houston*, 29 Tex. 335.

the public streets and carrying signs and placards advertising their religious beliefs, to procure a license from a local authority, but a city may not impose a flat license tax or make it unlawful for religious colporteurs to engage in the sale of religious books and pamphlets or to deny them the privilege of canvassing or soliciting within the municipality. It may, however, prohibit boys and girls under prescribed ages from selling religious periodicals upon the streets or other public places.²² (f) The appropriation of money to purchase textbooks for schools, even though some of the students attend parochial or other private schools,²³ but a state may not require public school students to salute the flag of the United States.²⁴ (g) The recognition of the fact that the great mass of the people of the United States are adherents of the Christian religion.²⁵

The principles of one's religion cannot be used as a defense in prosecution for the violation of the criminal laws. For example, the Supreme Court held that polygamy could not be justified because it was sanctioned by the Mormon religion. Adherents of the Christian Science faith could not use the tenets and practices of their church in defense of a criminal action for practicing medicine without a license, or for failing to furnish proper medical attention for a sick child. A state may refuse to admit a conscientious objector to the practice of the law because he refused to take an oath to support the Constitution of the state and to perform military service.²⁶

Speaking of this guaranty, Justice Frankfurter declared: "The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties

²² *Cox v. New Hampshire*, 312 U. S. 569, 85 L. ed. 1049, 133 A. L. R. 1396; *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. ed. 1292, 146 A. L. R. 81; *Martin v. Struthers*, 319 U. S. 141, 87 L. ed. 1313; *Prince v. Massachusetts*, 321 U. S. 158, 88 L. ed. 645; *Follett v. McCormick*, 321 U. S. 573, 88 L. ed. 938, 152 A. L. R. 317.

²³ *Cochran v. Louisiana State Board of Education*, 281 U. S. 370; 74 L. ed. 913.

²⁴ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 87 L. ed. 1628, 147 A. L. R. 87.

²⁵ *Vidal v. Girard*, 2 How. 127, 11 L. ed. 205; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Zeisweiss v. James*, 63 Pa. 465, 3 Am. Rep. 558.

²⁶ *Mormon Church v. United States*, 136 U. S. 1, 34 L. ed. 481; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *State v. Marble*, 72 Ohio St. 21, 73 N. E. 1063, 106 Am. St. Rep. 570; *In re Summers*, 325 U. S. 561, 89 L. ed. 1795; *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666.

of particular sects. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relative concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized."²⁷

§ 257. **Personal Liberty.** Personal liberty consists of the power of locomotion, of changing one's situation, or of moving one's person to whatever place one's own inclination may direct without imprisonment or restraint unless by due process of law.²⁸ It includes not only freedom from physical restraint, but also the right to enjoy life in any way that may be agreeable and pleasant, and to live as one may desire according to one's temperament and nature.²⁹ It includes freedom from involuntary servitude,³⁰ but service in the armies of the United States is not involuntary servitude.³¹ It includes the right to travel upon the public highways and to transport one's property thereon by automobile, carriage or wagon, and to visit public places, the right of privacy, the right to be let alone, and the right to be free in the enjoyment of all the faculties with which one has been endowed by his creator, subject only to such restraints as are necessary for the common welfare. It also includes the fundamental personal rights and liberties which are secured by the Fourteenth Amendment against abridgement.³²

Personal liberty, however, cannot interfere with the rights of others or of the public. In organized society, this liberty is limited so far as is necessary for the preservation of the state and the pro-

²⁷ *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 84 L. ed. 1375, 127 A. L. R. 1493.

²⁸ 1 Blackstone's Commentaries, 129, 134; *Korematsu v. United States*, 323 U. S. 214, 89 L. ed. 194 (legal restrictions may be imposed during time of war, but they will be subject to the most rigid scrutiny by the courts).

²⁹ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

³⁰ Amendment XIII.

³¹ *Arver v. United States*, 245 U.

S. 366, 62 L. ed. 349, L. R. A. 1918 C 361, Ann. Cas. 1918 B 856.

³² *Henry v. Cherry*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; *Slusher v. Safety Coach Transit Co.*, 229 Ky. 731, 17 S. W. (2d) 1012, 66 A. L. R. 1378; *Grosjean v. American Press Co.* 297 U. S. 233, 80 L. ed. 660; *Sides v. F-R. Pub. Corp.*, 113 F. (2d) 806, 138 A. L. R. 15; *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 1093; *De Jonge v. Oregon*, 299 U. S. 353, 81 L. ed. 278.

tection of every citizen from the lawless acts of others. The qualifications and restraints which the law may properly impose, classed according to their purpose,³³ are as follows: (a) Those imposed to prevent the commission of a crime which is threatened. (b) Those in punishment of a crime committed. (c) Those in punishment of contempts of court or legislative bodies, or to render their jurisdiction effectual.³⁴ (d) Those necessary to enforce the duty citizens owe in defense of the state. An example of this restraint is the conscription law enacted by the Federal government during World War I, and the Selective Training and Service Act approved September 16, 1940.³⁵ (e) Those necessary to protect the United States in the time of war or threatened public danger, or required military necessity. Examples of this restraint were the dimouts and blackouts and the curfew orders by commanding officers in World War II. Another example was the exclusion of American citizens of Japanese ancestry from certain prescribed areas, but a Japanese citizen whose loyalty is unquestioned may not be detained in a relocation center.³⁶ (f) Those which may become important to protect the community against the acts of persons who, by reason of mental infirmity, are incapable of self control. This classification includes insane persons and those inflicted with dangerous infectious diseases as well as vagabonds and paupers,³⁷ and others who would endanger the peace, security or health of the community.³⁸ (g) Those which spring from the helpless or dependent condition of individuals in various relations of life. This classifica-

³³ See *Ex parte Hudgins*, 86 W. Va. 526, 103 S. E. 327, 9 A. L. R. 1361.

³⁴ *Commonwealth of Massachusetts v. Klaus*, 145 App. Div. 798, 130 N. Y. S. 713; *People v. Society for Prevention of Cruelty to Children*, 48 Misc. 175, 95 N. Y. S. 250.

³⁵ Conscription law during war, see *Arver v. United States*, 245 U. S. 366, 62 L. ed. 349, L. R. A. 1918 C 361, Ann. Cas. 1918 B 856. For conscription law enacted as a peacetime defensive measure, see *Selective Training and Service Act* approved September 16, 1940, 50 USC 301-318. See also *Butler v. Perry*, 240 U. S. 328, 60 L. ed. 672 (requir-

ing able-bodied male persons to work on the public roads).

³⁶ *Hirabayashi v. United States*, 320 U. S. 81, 87 L. ed. 1774; *Yasui v. United States*, 320 U. S. 115, 87 L. ed. 1795, 146 A. L. R. 1463; *Korematsu v. United States*, 323 U. S. 214, 89 L. ed. 194; *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243.

³⁷ *Chaloner v. Sherman*, 242 U. S. 455, 61 L. ed. 427; *Leavitt v. Morris*, 105 Minn. 170, 117 N. W. 393, 17 L. R. A. (N. S.) 984; *In re Stegenga*, 133 Mich. 55, 94 N. W. 385, 61 L. R. A. 763.

³⁸ *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473.

tion includes the paternal and corrective care of homeless, abandoned or neglected children, as well as those who are delinquent or incorrigible.³⁹

The restraint of personal liberty through imprisonment for debt, or as a coercive measure to enforce civil obligations, has been abolished almost universally.⁴⁰ This does not mean, however, that one may not be imprisoned for the failure to pay fines or penalties,⁴¹ or for the failure to pay alimony as adjudged in divorce cases.⁴² It does not prevent the arrest or detention of absconding debtors,⁴³ or those contracting debts through fraud,⁴⁴ or those issuing checks without funds in a bank,⁴⁵ or one beating a board bill,⁴⁶ or the violation of laws of a criminal, quasi-criminal or tortious character.⁴⁷

§ 258. **Right of Property.** Property is ownership. It consists of the free enjoyment of one's acquisitions without control or diminution save by the law of the land.⁴⁸ It consists not merely of ownership and possession, but in the unrestricted right of use and disposal. Anything which destroys any of these elements to that extent destroys the property itself.⁴⁹ The right of property is a natural right and neither the Federal government,⁵⁰ nor the state government can deprive its owner of it or its possession except by the due process of law.⁵¹

³⁹ *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914 A 1222; *Ex parte King*, 141 Ark. 213, 217 S. W. 465; *Ex parte Watson*, 157 N. C. 340, 72 S. E. 1049.

⁴⁰ *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039, L. R. A. 1916 B 993, Ann. Cas. 1917 D 833; *State v. Prudential Coal Co.*, 130 Tenn. 275, 170 S. W. 56, L. R. A. 1915 B 645; *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191.

⁴¹ *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651.

⁴² *Adams v. Adams*, 80 N. J. Eq. 175, 83 Atl. 190, Ann. Cas. 1913 E 1083.

⁴³ *Hamilton v. Pacific Drug Co.*,

78 Wash. 689, 139 Pac. 642.

⁴⁴ *Tatlow v. Bacon*, 101 Kan. 26, 165 Pac. 835, 14 A. L. R. 269.

⁴⁵ *State v. Avery*, 111 Kan. 588, 207 Pac. 838, 23 A. L. R. 453.

⁴⁶ *Clark v. State*, 171 Ind. 104, 84 N. E. 984, 16 Ann. Cas. 1229; *Ex parte Fred Milecke*, 52 Wash. 312, 100 Pac. 743, 21 L. R. A. (N. S.) 259, 132 Am. St. Rep. 968.

⁴⁷ *Tennessee v. Prudential Coal Co.*, 130 Tenn. 275, 170 S. W. 56, L. R. A. 1915 B 645.

⁴⁸ 1 Blackstone's Commentaries (Cooley Ed.) 127.

⁴⁹ *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, L. R. A. 1918 C 210, Ann. Cas. 1918 A 1201.

⁵⁰ Amendment V.

⁵¹ Amendment XIV.

Property includes not only real estate and personal property, but also incorporeal rights such as patents, copyrights, leases, accounts and choses in action, and every other thing of an exchangeable value which one may have.⁵²

Under our system of government, property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others.⁵⁴ These limitations of ownership, more specifically stated, are as follows: (a) All property is subject to the taxing power of the state.⁵⁵ (b) It is subject to the right of eminent domain.⁵⁶ (c) It is subject to the police power.⁵⁷ (d) If devoted to public use, it is subject to regulation by the states and the Federal government. (e) It is subject to draft during wartime by the Federal government.⁵⁸

§ 259. Right to Bear Arms. The right to bear arms is a natural right not granted by the Constitution and is not in any way dependent upon it. The Second Amendment, means no more than that it shall not be infringed or denied by Congress.⁵⁹ The arms referred to were such as swords, guns, rifles, muskets and other weapons used to arm, train and discipline the militia, which at the time of the adoption of the Constitution comprised all male citizens physically capable of acting in concert for the common defense. At that time sentiment was strongly against standing armies and the purpose of the amendment was to guarantee the effectiveness of the militia of the several states.⁶⁰

The guarantee does not extend to weapons not used in warfare or defense, or such as are used in private broils and affrays. Thus it is not an invasion of the right to make it unlawful for any person

⁵² *Terrace v. Thompson*, 263 U. S. 197, 68 L. ed. 255; *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535, L. R. A. 1918 A 1034; *Board of Education v. Blodgett*, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348.

⁵⁴ *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535, L. R. A. 1918 A 1034.

⁵⁵ See Chap. 29, *infra*.

⁵⁶ See Chap. 28, *infra*.

⁵⁷ See Chap. 27, *infra*.

⁵⁸ *Moler v. Whisman*, 243 Mo.

571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913 D 395; *United States v. Bethlehem Steel Corp.* 315 U. S. 289, 86 L. ed. 855; 50 USC 721-722.

⁵⁹ *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Re Rameriz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51.

⁶⁰ *United States v. Miller*, 307 U. S. 174, 83 L. ed. 1206; *State v. Workman*, 35 W. Va. 367, 14 S. E. 137, 14 L. R. A. 508.

to carry a pistol or revolver such as is concealed upon the person, or to carry a bowie knife, dirk knife, metal knuckles, a sword cane, a Spanish stiletto or similar weapons.⁶¹ In fact, in 1939 the Supreme Court declared valid an Act of Congress known as the National Firearms Act, regulating the transportation of firearms in interstate commerce and defining the term to mean a shotgun, a rifle or a machine gun with a barrel less than eighteen inches in length.⁶²

The guarantee places no restriction upon the powers of the states. Therefore, a state statute prohibiting the carrying of dangerous weapons⁶³ or a statute forbidding bodies of men to associate together as military organizations or to drill or parade with arms in cities unless authorized by law⁶⁴ have been held not to abridge the constitutional privileges or immunities of citizens of the United States. The powers of the states to provide for calling forth the militia, and to provide for organizing, arming and disciplining it are specifically defined in the Constitution.⁶⁵

§ 260. Right to Choose an Occupation. A citizen has the right to pursue any lawful vocation which he may choose.⁶⁶ This means that he may select any legitimate or licit occupation, business, trade or profession and that he may engage in it in his own way.⁶⁷ It is a right to live and work where he wills.⁶⁸ The right is a property right, and a state cannot enact a statute that it shall no longer be considered as such.⁶⁹ The right extends to aliens who, under the protection of the Constitution, may earn a living by following any of the ordinary occupations.⁷⁰ The right cannot be taken away

⁶¹ *Re Rameriz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51; *Pierce v. State*, 42 Okla. Cr. R. 272, 275 Pac. 393, 73 A. L. R. 833; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715; *State v. Workman*, 35 W. Va. 367, 14 S. E. 137, 14 L. R. A. 508.

⁶² 26 USC 1132; *United States v. Miller*, 307 U. S. 174, 83 L. ed. 1206.

⁶³ *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812.

⁶⁴ *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615.

⁶⁵ Const. Art. I, § 8, cl. 15.

⁶⁶ *Landberg v. City of Chicago*,

237 Ill. 112, 86 N. E. 638, 21 L. R. A. (N. S.) 830, 127 Am. St. Rep. 319.

⁶⁷ *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534.

⁶⁸ *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917 F 1163, Ann. Cas. 1917 D 973.

⁶⁹ *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853, L. R. A. 1915 F 831.

⁷⁰ *Terrace v. Thompson*, 263 U. S. 197, 68 L. ed. 255; *Webb v. O'Brien*, 263 U. S. 313, 68 L. ed. 318.

under the guise of regulation.⁷¹ It is protected by the Federal Constitution as well as the several state constitutions.⁷²

The right, however, is subject to the police power of the states. Every lawful and useful occupation may be subjected to such reasonable regulation as will safeguard the public interest,⁷³ and statutes and ordinances enacted within the scope of this power do not constitute an infringement on vested rights.⁷⁴ These restrictions must be exercised in accordance with the Constitutional requirement that they must operate equally upon all persons pursuing the same business or profession under the same circumstances. If the restrictions are arbitrary or unreasonable, the courts will interfere.⁷⁵

§ 261. Freedom of Contract. Liberty of contract is an inherent and inalienable right,⁷⁶ universally recognized to be within the protection of the Fifth and Fourteenth Amendments,⁷⁷ as well as safeguarded by most state constitutions.⁷⁸ While the Federal Constitution does not speak of the freedom of contract, the term is embraced in the definition of liberty as used in the due process clauses.⁷⁹ Every man has the right to deal with his fellow men freely and in accordance with his own discretion.⁸⁰ This is a part of the liberty guaranteed to every citizen.⁸¹

⁷¹ *Riley v. Chambers*, 181 Cal. 589, 185 Pac. 855, 8 A. L. R. 418.

⁷² *Weyeth v. Board of Health of City of Cambridge*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439; *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917 F 1163, Ann. Cas. 1917 D 973.

⁷³ *Riley v. Chambers*, 181 Cal. 589, 185 Pac. 855, 8 A. L. R. 418; *Commonwealth v. Beaulieu*, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913 E 1080.

⁷⁴ *Collins v. Texas*, 223 U. S. 288, 56 L. ed. 439; *Bowen v. Hannah*, 167 Tenn. 451, 71 S. W. (2d) 672; *Ex parte Carlson*, 87 Cal. App. 584, 262 Pac. 792; *Seignious v. Rice*, 273 N. Y. 44, 6 N. E. (2d) 91.

⁷⁵ *People v. Love*, 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703.

⁷⁶ *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315.

⁷⁷ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

⁷⁸ *Ex parte Hayden*, 147 Cal. 649, 83 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; *Re Opinion of Justices*, 271 Mass. 598, 171 N. E. 234, 68 A. L. R. 1265. For example, see Constitution of California, Art. I, § 16; Constitution of Illinois, Art. II, § 2; Constitution of Georgia, Art. I, § 1, par. 3; and Constitution of Florida (Declaration of Rights) § 12.

⁷⁹ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

⁸⁰ *State v. Gateway Mortuaries*, 87 Mont. 225, 287 Pac. 156, 68 A. L. R. 1512; *Advance-Rumely Thresher Co. v. Jackson*, 287 U. S. 283, 77 L. ed. 306, 87 A. L. R. 285; *Tucson v. Stewart*, 45 Ariz. 36, 40 P. (2d) 72, 96 A. L. R. 1492.

⁸¹ *Federal Trade Commission v.*

This general rule is subject to several exceptions. It does not apply to minors or children of tender years.⁸³ It does not prevent the state from limiting or prohibiting governmental agencies or political subdivisions the right of contract.⁸⁴ The legislature may limit the power of a corporation to contract through the general power to amend or repeal its charter.⁸⁵

Freedom of contract is a qualified right. It is subject to regulation by Congress whenever it is reasonably necessary to effect any of the purposes for which the government was established.⁸⁶ "There is no absolute freedom to do as one wills or to contract as one chooses," asserted Chief Justice Hughes. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."⁸⁷ The right of contract is also subject to regulation by the states under the police power.⁸⁸ When this freedom conflicts with the power and duty of the state to safeguard its property, its welfare, and its people, it may be regulated and limited to the extent which is reasonably necessary to carry such power and duty into effect.⁸⁹ Unreasonable regulations and restrictions, however, cannot be made, even though they may be claimed to be in the interest of public welfare.⁹⁰

§ 262. Pursuit of Happiness. The pursuit of happiness is a natural and inalienable right, being one of the main purposes for which the government was created. It was recognized in the Dec-

Raymond Bros.-Clark Co., 263 U. S. 565, 68 L. ed. 448, 30 A. L. R. 1114.

⁸³ Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S. W. 887, 12 A. L. R. 1208.

⁸⁴ Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 29 A. L. R. 1471.

⁸⁵ State v. Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856.

⁸⁶ Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 73 L. ed. 688.

⁸⁷ West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

⁸⁸ West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330; Watertown Milk Producers Co-op. Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N. W. 209, 77 A. L. R. 391.

⁸⁹ Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 87 A. L. R. 721; Cameron v. International Alliance of Theatrical Stage Employees, 118 N. J. Eq. 11, 176 Atl. 692, 97 A. L. R. 594.

⁹⁰ Public Service Commission of Wyoming v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A. L. R. 534.

laration of Independence, which announced "that all men are created equal; that they are endowed by the creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." ⁹¹

The term pursuit of happiness is a comprehensive expression which covers a broad field. It includes the right to acquire and enjoy private property; ⁹² to enjoy safety, peace and quiet; ⁹³ to enjoy privacy; ⁹⁴ to have protected one's reputation; ⁹⁵ to enjoy the domestic relations and privileges of one's family and home; ⁹⁶ to express one's preference in the choice of an occupation; and generally to enjoy a full liberty of conscience and personal freedom. ⁹⁷

The right is subject to the regulatory powers of the government. ⁹⁸ While the government guarantees the right to pursue one's happiness, yet the same government is charged with the protection of the rights of others in the pursuit of their happiness, and hence this inalienable right must be subject to the same right in all others. ⁹⁹ In other words, the enjoyment of the right does not signify absolute and unrestrained license to follow the dictates of an unbridled will. ¹⁰⁰ Under the police power, the state may impose such reasonable regulations and limitations on the pursuit of happiness as is necessary to protect the public morals, public health, public safety and the general welfare, ¹⁰¹ but such regulations cannot be arbitrary. ¹⁰²

⁹¹ *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711.

⁹² *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711; *Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P. (2d) 871.

⁹³ *Brown v. City of Los Angeles*, 183 Cal. 783, 192 Pac. 716.

⁹⁴ *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91.

⁹⁵ *Neafie v. Hoboken Printing & Publishing Co.*, 75 N. J. L. 564, 68 Atl. 146.

⁹⁶ *Brown v. City of Los Angeles*, 183 Cal. 783, 192 Pac. 716.

⁹⁷ *Nunnemacher v. State*, 129

Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711.

⁹⁸ *Whitaker v. Parsons*, 80 Fla. 352, 86 So. 247.

⁹⁹ *Townsend v. State*, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477.

¹⁰⁰ *Commonwealth v. Libbey*, 216 Mass. 356, 103 N. E. 923, 49 L. R. A. (N. S.) 879, Ann. Cas. 1915 B 659.

¹⁰¹ *Commonwealth v. Libbey*, 216 Mass. 356, 103 N. E. 923, 49 L. R. A. (N. S.) 879, Ann. Cas. 1915 B 659.

¹⁰² *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328.

§ 263. **Right to an Education.** The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted.¹⁰³ The term liberty as used in the Fourteenth Amendment has been construed by the Supreme Court to include the right to acquire useful knowledge and to enjoy freedom in the subjects to be taught, as well as in the schools which children may attend.¹⁰⁴ Many state constitutions have empowered the states to fix essential educational standards; provided that it is their paramount duty to make ample provision for the education of all children residing within their borders, without distinction or preference on account of race, color, caste or sex; and have required the legislatures to establish general and uniform systems of public schools.¹⁰⁵ Most of the states have also established compulsory education.¹⁰⁶

Parents and guardians have the right to direct the upbringing and education of children under their control. This right is guaranteed by the Fourteenth Amendment and it may not be abridged. The state cannot standardize its children by forcing them to attend the public schools to the exclusion of private or parochial schools. "The child is not the mere creature of the state," declared Justice McReynolds, "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁰⁷

The right to attend school, however, is subject to reasonable regulations the same as other civil rights. Under the police power, the state may require children to take a physical examination¹⁰⁸ and to be vaccinated¹⁰⁹ in order to protect the public health, and children suffering from contagious diseases may be excluded.¹¹⁰

¹⁰³ *Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446.

¹⁰⁴ *Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446.

¹⁰⁵ 1 *Remington Revised Statutes of Washington*, 459-460. See generally Thorpe, *American Charters, Constitutions and Organic Laws*.

¹⁰⁶ *State v. Jackson*, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

¹⁰⁷ *Pierce v. Society of Sisters*,

268 U. S. 510, 69 L. ed. 1070, 39 A. L. R. 468.

¹⁰⁸ *Streich v. Board of Education of Independent School Dist., City of Aberdeen*, 34 S. D. 169, 147 N. W. 779, L. R. A. 1915 A 632, Ann. Cas. 1917 A 760.

¹⁰⁹ *Matter of Vieineister*, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859; *State v. Martin*, 134 Ark. 420, 204 S. W. 622.

¹¹⁰ *Matter of Vieineister*, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859.

To deny the teaching, however, of any other language than English in any private, denominational, parochial or public school is a violation of the liberty guaranteed by the Fourteenth Amendment.¹¹¹

§ 264. Marriage and Divorce. The right to enter into the marital relationship is a natural right.¹¹² Although it is not mentioned in the Constitution, the right to marry, to establish a home and to bring up children is included in the guaranty of the Fourteenth Amendment.¹¹³ Marriage is a status to which the state is a party and the state may, therefore, regulate it. "Marriage, as creating the most important relationship of life," remarked Justice Field, "as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights, both present and prospective, and the acts which may constitute grounds for its dissolution."¹¹⁴

The states have the right to prescribe general and uniform laws for the dissolution of marriages and to prescribe the procedure for such dissolution. In fact, all of the states have adopted statutes enumerating the grounds of divorce, and defining the procedure necessary to secure a decree of divorce. Legislation affecting or annulling the marriage relationship, being remedial in nature, is not within the provision prohibiting states from impairing the obligation of a contract.¹¹⁵

§ 265. Protection of Vested Rights. The term vested right is used here in its general constitutional sense.¹¹⁶ It is the power to perform certain actions or to possess certain things lawfully,¹¹⁷

¹¹¹ Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446.

¹¹² Byers v. Sun Sav. Bank, 41 Okla. 728, 139 Pac. 948, Ann. Cas. 1916 D 222.

¹¹³ Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446.

¹¹⁴ Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654.

¹¹⁵ Maynard v. Hill, 125 U. S.

190, 31 L. ed. 654; Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815, 109 A. L. R. 1229; Hunt v. Hunt, 24 L. ed. 1109; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

¹¹⁶ Steinfeld v. Nielsen, 15 Ariz. 424, 139 Pac. 879; Pearsall v. Great Northern R. Co., 161 U. S. 646, 40 L. ed. 838.

¹¹⁷ Crump v. Guyer, 60 Okla. 222, 157 Pac. 321, 2 A. L. R. 331.

and of which a person cannot be deprived without his consent.¹¹⁸ While the term is not used either in the Constitution or the amendments, it is included within the provisions of the Fourteenth Amendment.¹¹⁹ A right is considered vested when its enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.¹²⁰ It must be something more than an expectation of an interest or benefit to be derived from the continued existence of general Federal or state laws.¹²¹ The term is properly confined to rights of a private or individual nature rather than to those which are public.¹²²

A vested right is a property right and when it has been once conferred, or becomes absolute by contract or existing laws, it is protected from invasion by the legislature. A failure to exercise such a right, before the passage of an act which seeks to divest it, in no way affects or lessens it.¹²³

The line of demarcation between rights in which a person may have a vested interest and those in which he may not will be defined more clearly by illustrating each class. *Among the principal rights in which a person may have a vested interest are the following:* (a) Estates in real and personal property, but these are subject to regulation under the police power,¹²⁴ the taxing power¹²⁵ and other powers of the states,¹²⁶ (b) franchises and privileges,¹²⁷ but these may be regulated by later laws;¹²⁸ (c) rights of action accruing at common law or by contract which are settled in particular persons and defenses;¹²⁹ final judgments.¹³⁰

¹¹⁸ Merchants' Bank v. Garrard, 158 Ga. 867, 124 S. E. 715, 38 A. L. R. 102.

¹¹⁹ Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483.

¹²⁰ Pearsall v. Great Northern R. Co., 161 U. S. 646, 40 L. ed. 838.

¹²¹ Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Middleton v. Texas Power & Light Co., 249 U. S. 152, 63 L. ed. 527.

¹²² McSurety v. McGrew, 140 Iowa 163, 118 N. W. 415, 132 Am. St. Rep. 248.

¹²³ Crump v. Guyer, 60 Okla. 222, 157 Pac. 321, 2 A. L. R. 331.

¹²⁴ See Chap. 28, infra; State v. Lane, 126 Minn. 78, 147 N. W.

951, 52 L. R. A. (N. S.) 932, Ann. Cas. 1915 D 549.

¹²⁵ See Chap. 29, infra.

¹²⁶ Arnett v. Reade, 220 U. S. 311, 55 L. ed. 477, 36 L. R. A. (N. S.) 1040.

¹²⁷ Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557.

¹²⁸ City of Pocatello v. Murray, 21 Idaho 180, 120 Pac. 812.

¹²⁹ Relyea v. Tomahawk Pulp & Paper Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878; Baltimore & O. S. W. Ry. Co. v. Read, 158 Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. Rep. 293.

¹³⁰ Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819.

Among the principal rights in which a person may not have a vested interest are the following: (a) Existing law, which precludes its change or repeal or in the omission to legislate on a particular subject.¹³¹ (b) Remedial legislation, a state has complete control over the remedies which it may afford suitors.¹³² (c) Rules of evidence in civil cases.¹³³ (d) Penalties and forfeitures, at least until a final judgment for them is recovered.¹³⁴ (e) Public offices, including officers protected by civil service regulations.¹³⁵ (f) Statute of limitations, provided that rights are not cut off arbitrarily.¹³⁶ Any statute of limitation, however, must provide a reasonable time in which to bring an action.¹³⁷ (g) Privileges and exemptions. Exemptions from such public duties as military service and jury duty are mere gratuities.¹³⁸

§ 266. Searches and Seizures. The Fourth Amendment provided a guaranty against unlawful searches and seizures. It reads:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The right of privacy and security in one's dwelling house is a civil right, which existed long before the adoption of the Constitution.¹³⁹ The Fourth Amendment merely guaranteed this right, and its purpose was to prevent violations of private security in person and property and the unlawful invasion of the sanctity of the

¹³¹ *Truax v. Corrigan*, 257 U. S. 12, 66 L. ed. 254, 27 A. L. R. 375; *Henry v. McKay*, 164 Wash. 526, 3 P. (2d) 145, 77 A. L. R. 1025.

¹³² *Gibbes v. Zimmerman*, 290 U. S. 326, 78 L. ed. 342.

¹³³ *Steen v. Modern Woodmen of America*, 296 Ill. 104, 129 N. E. 546, 17 A. L. R. 406.

¹³⁴ *Confiscation Cases*, 7 Wall. 454, 19 L. ed. 196.

¹³⁵ *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; *James v. O'Toole*, 190 Cal. 252, 212 Pac. 9.

¹³⁶ *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378.

¹³⁷ *Lawrence v. City of Louisville*, 96 Ky. 595, 29 S. W. 450, 27 L. R. A. 560, 49 Am. St. Rep. 309.

¹³⁸ *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820, 8 L. R. A. (N. S.) 498, 9 Ann. Cas. 141; *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912 B 251.

¹³⁹ *United States v. Crosley*, 1 Hughes 448, Fed. Cas. No. 14,893.

home of the citizen by officers of the law acting under legislative or judicial sanction.¹⁴⁰

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein," declared Justice Butler. "The protection of the Fourth Amendment extends to all equally," he continued, "to those justly suspected and accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose."¹⁴¹ The main, if not the sole, purpose of these inhibitions was to place a salutary restriction on the powers of the Federal government.¹⁴² They do not extend to the state governments, nor apply to proceedings in the state courts,¹⁴³ but similar guaranties have been incorporated in the constitution of every state.¹⁴⁴ They have no bearing on the unauthorized acts of private persons or of petty agents of the law.¹⁴⁵

The procedure authorized by the amendment for a lawful search or seizure is through the issuance of a search warrant. Such a warrant must be issued by a magistrate or judge, usually a justice of the peace, upon probable cause, which means that it must be

¹⁴⁰ *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575.

¹⁴¹ *Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145. See also *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 39 A. L. R. 790; *Husty v. United States*, 282 U. S. 694, 75 L. ed. 629, 74 A. L. R. 1407.

¹⁴² *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Gambino v. United States*, 275 U. S. 310, 72 L. ed. 293, 52 A. L. R. 1381 (evidence obtained by state officers co-operating with Federal officials cannot be used in trial).

¹⁴³ *Johnson v. State*, 152 Ga. 271, 109 S. E. 662, 19 A. L. R. 641.

¹⁴⁴ *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; *Allen v. State*, 183 Wis. 323, 197 N. W. 808, 39 A. L. R. 782. For examples, see Constitution of Maine, Art. I, § 5; Constitution of Maryland, Art. I, § 26; Constitution of Massachusetts, Part First, § 14; and Constitution of Iowa, Art. I, § 8.

¹⁴⁵ *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Burdeau v. McDowell*, 256 U. S. 465, 65 L. ed. 1048, 13 A. L. R. 1159.

based on facts, not mere guesses or conclusions, and must be supported by such evidence as would be admissible on a trial of the case.¹⁴⁶ It must also be supported by the oath or affirmation of the complaining party. The warrant must particularly describe the place to be searched and the person or things to be seized.¹⁴⁷ The officer executing the warrant may use force if necessary and may, therefore, break open doors if admittance is denied.¹⁴⁸

The grounds upon which a search warrant may be issued are (a) When the property sought has been stolen or embezzled; (b) when it has been used as a means of committing a felony; (c) when it is in the possession of any person intending to use it as the means of committing a public offense;¹⁴⁹ or (d) when it is sought in connection with the enforcement of police regulations¹⁵⁰ or in aid of sanitary regulation.¹⁵¹ Search warrants may not be used by individuals in civil proceedings or for the maintenance of any private right.¹⁵² Letters and packages, stamped and in the mail, are protected from examination and inspection except as to outward form and weight, the same as if they were still in the domicile of the sender. The guaranty prohibits the production of one's private papers and books to be used against him in criminal or penal proceedings but incriminating documents secured by state officials without the participation of Federal offices, but turned over to them, are admissible in a Federal prosecution.¹⁵³

The guaranty, however, does not extend to corporations which are, in fact, creatures of the state. They are presumed to be created for the benefit of the public receiving special privileges and franchises, and they have no right to refuse to submit their books and papers at a suit of the state, but they are protected against unreasonable searches and seizures.¹⁵⁴ It is contrary to the first

¹⁴⁶ *Grau v. United States*, 287 U. S. 124, 77 L. ed. 212; *Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145.

¹⁴⁷ Amendment IV.

¹⁴⁸ *Sauto v. State*, 2 Iowa 165, 63 Am. Dec. 487.

¹⁴⁹ *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. ed. 372.

¹⁵⁰ *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

¹⁵¹ *Spring v. Inhabitants of*

Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

¹⁵² *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915 B 834, Ann. Cas. 1915 C 1177.

¹⁵³ *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746.

¹⁵⁴ *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 15 Ann. Cas. 645; *Ramsey v. Home Mortgage Co.* 47 F. (2d)

principles of justice to allow a search through all the records of a private corporation, relevant or irrelevant, in the hope that something tending to incriminate the corporation may turn up. An officer of a corporation, or of an unincorporated organization such as a labor union, however, who has custody of its books and papers, has no constitutional right to object to the production of the corporate records in court because they tend to incriminate him. The privilege against self-incrimination, defined by the Fifth Amendment, does not afford such protection.¹⁵⁵

Under certain conditions, officers may search a person or property without a warrant. They may search one lawfully under arrest. They may also seize property from one resisting arrest or one endeavoring to escape. An officer may, without a warrant, arrest a person committing a crime in his presence and may search the immediate place where the arrest is made and may seize all things connected with the crime. He may seize papers of a public nature, or in which the public has an interest and things which are unlawfully the subject of private property.¹⁵⁶ Officers may search an automobile, a motor boat, a ship or other conveyance for contraband goods, where it is not practicable to secure a warrant and the vehicle may be quickly removed from the locality and the jurisdiction of the court, provided that he has probable cause for suspecting that the law is being violated;¹⁵⁷ and officers of the Coast Guard may seize American vessels on the high seas when there is probable cause to believe them subject to seizure for violation of the revenue laws.¹⁵⁸ Officers may not, however, arrest

621; *Silverhorne Lumber Co. v. United States*, 251 U. S. 385, 64 L. ed. 319, 24 A. L. R. 1426; *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 88 L. ed. 1024.

¹⁵⁵ *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 68 L. ed. 696, 32 A. L. R. 786; *Essgee Co. v. United States*, 262 U. S. 151, 67 L. ed. 917; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, Ann. Cas. 1912 D 558; *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309; *Grant v. United States*, 227 U. S. 74, 57 L. ed. 423; *United States v. White*, 322 U. S. 694, 88 L. ed. 1542, 152 A. L. R. 1202.

¹⁵⁶ *Kelley v. United States (C. C. A.)* 61 F. (2d) 843, 86 A. L. R. 338; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465. See also *Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145; *Bartlett Frazier Co. v. Hyde (C. C. A.)* 65 F. (2d) 350; *Marron v. United States*, 275 U. S. 192, 72 L. ed. 231.

¹⁵⁷ *Caroll v. United States*, 267 U. S. 132, 69 L. ed. 545, 39 A. L. R. 790.

¹⁵⁸ *Maul v. United States*, 274 U. S. 501, 71 L. ed. 1171.

a person without a warrant on mere suspicion that he is violating the law; for example, because they smelled the odor of intoxicating liquor upon passing the house of the accused,¹⁵⁹ or because they suspected him of carrying a concealed weapon.¹⁶⁰ A person may consent to a search of his property,¹⁶¹ but a consent obtained through threats or coercion is not binding upon him.¹⁶²

The compulsory production of books and papers by Congress, by an administrative agency or officer of the government or by the courts through an order, summons or subpoena duces tecum, is not a violation of this guaranty, provided that such demand was not unreasonable and oppressive. For example, the Secretary of Commerce was empowered to order a steamship operator to file a copy or summary of its books or records;¹⁶³ the Securities and Exchange Commission required a mining company to produce engineers' reports, mining records and assay records of stock;¹⁶⁴ an internal revenue agent required a witness to appear and testify as to the tax liability of a company with which he had had business dealings.¹⁶⁵ Congress may compel the production of testimony upon matters in order to frame legislation.¹⁶⁶ A bank may be compelled to produce records of an income taxpayer's account.¹⁶⁷ A customer cannot prevent brokers from complying with subpoenas issued by the Securities and Exchange Commission to produce copies of the customer's account.¹⁶⁸ Telegraph companies may be required to produce telegrams sent or received within a stated time by certain parties with reference to parties and subjects being investigated, and the disclosure of such telegrams does not violate the right of privacy of the senders or their rights under the guaranty of the Fourth Amendment.¹⁶⁹

¹⁵⁹ *DePater v. United States*, 34 F. (2d) 275, 74 A. L. R. 1413.

¹⁶⁰ *Pickett v. State*, 99 Ga. 12, 25 S. E. 608, 59 Am. St. Rep. 226.

¹⁶¹ *United States v. Bianco* (C. C. A.) 96 F. (2d) 97.

¹⁶² *United States v. Abrams*, 230 Fed. 313; *Kovach v. United States*, 53 F. (2d) 639.

¹⁶³ *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 81 L. ed. 562.

¹⁶⁴ *Consolidated Mines of California v. Securities & Exchange Commission* (C. C. A.) 97 F. (2d)

704. See also *Penfield Co. v. Security & Exchange Commission* 143 F. (2d) 746, 154 A. L. R. 1027.

¹⁶⁵ *In re Keegan*, 18 F. Supp. 746.

¹⁶⁶ *Federal Trade Commission v. National Biscuit Co.*, 18 F. Supp. 667.

¹⁶⁷ *Cooley v. Bergen*, 27 F. (2d) 930.

¹⁶⁸ *McMann v. Securities & Exchange Commission* (C. C. A.) 87 F. (2d) 377, 109 A. L. R. 1445.

¹⁶⁹ *Newfield v. Ryan* (C. C. A.) 91 F. (2d) 700.

The general rule is that the Fourth Amendment is not applicable to departmental regulations requiring reports and disclosures in respect to business affected with a public interest, so far as the disclosures are reasonably necessary for the protection of the public.¹⁷⁰ On the other hand, since the adoption of the Federal Communications Act in 1934, the tapping of telephone wires has been prohibited in interstate and foreign communications, but this prohibition does not prevent the use of a detectaphone to listen to a conversation in an enjoining room.¹⁷¹ A Federal court has held that a subpoena duces tecum, calling for production of all writings of every kind in possession of a medical association, which were made, sent, or received by it or any individual or body during certain stated periods, relating to any individual or body engaged in providing prepaid medical care or low-cost group practice of medicine, was so broad as to be unreasonable and oppressive.¹⁷²

§ 267. Right of Trial by Jury. The right of trial by jury is one of the earliest concepts of the Anglican system of jurisprudence. It was brought to America by the early colonists and was firmly engrafted upon their idea of justice. The Constitution assumed its existence as an established institution without reaffirming it but, upon the demand of the people, it was written into our national bill of rights. The Seventh Amendment provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."¹⁷³

¹⁷⁰ *Bartlett Frazier Co. v. Hyde* (C. C. A.) 65 F. (2d) 350. See also *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771; *Essgee Co. v. United States*, 262 U. S. 151, 67 L. ed. 917.

¹⁷¹ 47 USC 605; *Weiss v. United States*, 308 U. S. 321, 84 L. ed. 298 (intrastate telephone communications intercepted by Federal agents not admissible as evidence); *Nardone v. United States*, 302 U. S. 379, 82 L. ed. 314; *Goldstein v. United States*, 316 U. S. 114, 86 L.

ed. 1312; *Goldman v. United States*, 316 U. S. 129, 86 L. ed. 1322. See also *Olmstead v. United States*, 277 U. S. 438, 72 L. ed. 944, 66 A. L. R. 376 (decided prior to adoption of Federal Communications Act).

¹⁷² *United States v. Medical Society of District of Columbia*, 26 F. Supp. 55.

¹⁷³ For right of trial by jury in criminal cases under Art. III, § 2, cl. 3 of the Constitution, see Chap. 24, § 304, *infra*.

The aim of the Amendment was to preserve the substance of this common-law right in civil cases, as distinguished from mere matters of form or procedure. Its purpose was to retain the common-law distinction between the province of the court and that of the jury, whereby issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.¹⁷⁴ Under the practice during the first one hundred fifty years of our Constitution, a trial by a jury of twelve persons was required unless expressly waived¹⁷⁵ but, under the new rules of procedure, a jury is waived unless expressly demanded. Rule 38 (d) provided that "the failure to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury."¹⁷⁶ While the right to a jury trial still exists, the burden of securing it has been shifted to the parties desiring it.¹⁷⁷ In a jury trial under these rules, the judge may comment on the evidence;¹⁷⁸ he may enter a directed verdict if there are no facts in evidence bearing upon the issue to be determined;¹⁷⁹ but, while he may grant a new trial, he cannot enter a judgment non obstante veredicto¹⁸⁰ and the court of appeals has no power to re-examine the facts upon appeal.¹⁸¹

The Seventh Amendment relates only to courts sitting under the authority of the United States, including the territories of Alaska and Hawaii¹⁸² and the District of Columbia.¹⁸³ It does not extend

¹⁷⁴ *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, 79 L. ed. 1636.

¹⁷⁵ *Scott v. Neeley*, 140 U. S. 109, 35 L. ed. 358; *United States v. Henderson's Distilled Spirits*, 14 Wall. 53, 20 L. ed. 815.

¹⁷⁶ See Rules of Civil Procedure for the District Courts of the United States.

¹⁷⁷ *United States v. Strewl* (C. C. A.) 99 F. (2d) 474; *Alfred Hoffman, Inc. v. Textile Machinery Works*, 27 F. Supp. 431.

¹⁷⁸ *United States v. Fourteen Packages of Pins*, 25 Fed. Cas. 15,151.

¹⁷⁹ *Lyon v. Mutual Benefit Health & Accident Ass'n*, 305 U.

S. 484, 83 L. ed. 303; *Galloway v. United States*, 319 U. S. 372, 87 L. ed. 1458.

¹⁸⁰ *Parsons v. Bedford*, 3 Pet. 447, 7 L. ed. 732; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022; *Glynn v. Krippner* (C. C. A.) 60 F. (2d) 406; *Moran v. Washington Railway & Electric Co.*, 60 App. D. C., 155, 49 F. (2d) 679.

¹⁸¹ *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 81 L. ed. 1177.

¹⁸² *Grant v. Pilgrim*, 95 F. (2d) 562; *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862.

¹⁸³ *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223.

to ceded territory not granted territorial rights by Congress, such as Puerto Rico and the Philippines.¹⁸⁴ The Amendment is not a limitation on the powers of the states, but all of the states have preserved the right of a jury trial in their constitutions. The states have unrestricted power to regulate the form and methods of trials in their jurisdictions.¹⁸⁵

This Amendment applies only to proceedings in the nature of a suit at common law.¹⁸⁶ It does not apply to actions equitable in nature,¹⁸⁷ or to cases in admiralty,¹⁸⁸ or to a statutory proceeding or to proceedings unknown to the common law at the time of the adoption of the Amendment.¹⁸⁹ It does not, therefore, apply to proceedings conducted by an administrative agency;¹⁹⁰ to a suit against the United States in the court of claims;¹⁹¹ to a suit to cancel a naturalization certificate;¹⁹² to an action for assessment of damages for patent infringement;¹⁹³ to an order for the deportation of an alien;¹⁹⁴ to a final decision of customs appraisers in regard to the value of imports;¹⁹⁵ and to proceedings in a bankruptcy court.¹⁹⁶

§ 268. Right to Obtain Justice Freely. The right to obtain justice freely was an established principle of Anglican jurisprudence. Article 40 of the Magna Charta, wrung from King John in 1215, provided that "To none will we sell, to none will we deny

¹⁸⁴ *Balzac v. Porto Rico*, 258 U. S. 298, 66 L. ed. 627.

¹⁸⁵ *Dudley v. Harrison, McCready & Co.*, 127 Fla. 687, 173 So. 820; *St. Louis & K. C. Land Co. v. Kansas City*, 241 U. S. 419, 60 L. ed. 1072; *Southern R. Co. v. City of Durham*, 266 U. S. 178, 69 L. ed. 231. For examples, see *Constitution of Indiana*, Art. I, §§ 19-20; *Constitution of Kansas* (Bill of Rights) § 5; and *Constitution of Michigan*, Art. VI, §§ 27-28.

¹⁸⁶ *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796.

¹⁸⁷ *Grant v. Pilgrim (C. C. A.)* 95 F. (2d) 562.

¹⁸⁸ *Waring v. Clarke*, 5 How. 460, 12 L. ed. 226.

¹⁸⁹ *National Labor Relations Board v. Jones & Laughlin Steel*

Corp., 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, 79 L. ed. 1636.

¹⁹⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352.

¹⁹¹ *McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189.

¹⁹² *Luria v. United States*, 231 U. S. 9, 58 L. ed. 811.

¹⁹³ *Filer & Stowell Co. v. Diamond Iron Works*, 270 Fed. 489.

¹⁹⁴ *Gee Wah Lee v. United States*, 25 F. (2d) 107.

¹⁹⁵ *Auffmordt v. Hedden*, 137 U. S. 310, 34 L. ed. 674.

¹⁹⁶ *In re Wood*, 210 U. S. 246, 52 L. ed. 1046.

or delay right or justice.”¹⁹⁷ This principle became one of the pillars of English law, and, in the latter part of the seventeenth century, was reaffirmed in the Penn cases, the records of which cases afford a glimpse of the painful struggles out of which was forged the Constitution of the United States.¹⁹⁸ Many of the states have adopted this principle with such provisions as “Every man shall have remedy by due course of law for injury done him in his person, property or reputation”¹⁹⁹ and similar provisions.²⁰⁰

The purpose of these provisions is to save from legislative abolishment jural rights which had become well established prior to the adoption of these constitutions.²⁰¹ They do not create new causes of action, neither do they prohibit their creation.²⁰² They mean that the courts shall always be open for the administration of justice by due course of law; that justice shall not be bought or sold; that it shall not be deferred by vexatious delays; that it shall not be withheld for any longer period than is required by orderly procedure; and that for every violation of the rights of an individual or individuals there shall be an adequate judicial remedy.²⁰³ “The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property is found in the constitutions of many of the states,” observed Chief Justice Bean of the Supreme Court of Oregon, “and means that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy.”²⁰⁴

The courts have held that this guaranty is violated by a trial before a judge who is prejudiced or who has decided the case before

¹⁹⁷ Taswell-Langmead, English Const. History (8th Ed.) 113.

¹⁹⁸ Trial of William Penn and William Mead, 22 Charles II. C. E. 1670, Cobbett's Collection of State Trials (1810) 951; Case of Edward Bushell, Broom's Constitutional Law, 115-139; Hammond v. Howell, Thomas Leading Cases on Constitutional Law, 147. See also the Penn Cases, 4 Univ. of Wash. L. Rev. (May, 1929) 49.

¹⁹⁹ Constitution of Oregon, Art. I, § 10.

²⁰⁰ See Constitution of Minnesota, Art. I, § 8; and Constitution of Mississippi, Art. III, § 24.

²⁰¹ Stewart v. Houk, 127 Ore. 589, 271 Pac. 998, 61 A. L. R. 1236.

²⁰² Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620, 121 A. L. R. 1481.

²⁰³ Stewart v. Houk, 127 Ore. 589, 271 Pac. 998, 61 A. L. R. 1236; Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620, 121 A. L. R. 1481.

²⁰⁴ Stewart v. Houk, 127 Ore. 589, 271 Pac. 998, 61 A. L. R. 1236.

hearing the evidence,²⁰⁵ by a law imposing heavy fines and penalties in order to deter an appeal to the courts in an attempt to resist the statute which the people considered unjust and oppressive,²⁰⁶ and by the charges of excessive fees for the use of the courts.²⁰⁷ It is not violated, however, by reasonable docket fees,²⁰⁸ or by the taxation of costs in legal proceedings,²⁰⁹ or by the court requiring a party to furnish security for proper costs.²¹⁰

²⁰⁵ *In re Cameron*, 126 Tenn. 614, 151 S. W. 64.

²⁰⁶ *State v. Crawford*, 74 Wash. 248, 133 Pac. 590, 46 L. R. A. (N. S.) 1039; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287; *Kadderly v. Portland*, 44 Ore. 118, 74 Pac. 710.

²⁰⁷ *Malin v. Lamoure County*, 27 N. D. 140, 145 N. W. 582, 50 L. R. A. (N. S.) 997, Ann. Cas. 1916 C 207.

²⁰⁸ *In re Lee*, 64 Okla. 310, 168 Pac. 53, L. R. A. 1918 B 144.

²⁰⁹ *Eckrich v. St. Louis Transit Co.*, 176 Mo. 321, 75 S. W. 755, 62 L. R. A. 911, 98 Am. St. Rep. 517.

²¹⁰ *In re Lee*, 64 Okla. 310, 168 Pac. 53, L. R. A. 1918 B 144; *Conley v. Woonsocket Institution for Savings*, 11 R. I. 147.

CHAPTER 21

EQUAL PROTECTION OF THE LAWS

Our whole system of law is predicated on the general fundamental principle of equality of application of the law.

—Chief Justice Taft

§ 269. **Constitutional Guaranty.** The equality of rights is a principle of republicanism. Every republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its power. The principle is indigenous to America and first found expression in the Declaration of Independence.

Under the Constitution, this duty was assumed by the states, and under the provisions of the Fourteenth Amendment it remained there. The amendment provided that "No state—shall—deny any person within its jurisdiction the equal protection of the laws." The power of the national government is limited to the enforcement of this guaranty.¹ The guaranty, however, is not a limitation on the legislative power of Congress² and does not purport to be.³

The guiding principle of this guaranty is that all persons similarly-circumstanced shall be treated alike both in privileges conferred and liabilities imposed.⁴ It has been said that "the equal protection of the laws is a pledge of the protection of equal laws."⁵ Speaking of the intention of the clause, Justice Field in 1884 asserted: "This clause undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or

¹ *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

² *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375; *Detroit Bank v. United States*, 317 U. S. 329, 87 L. ed. 304.

³ *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900.

⁴ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109, 106 A. L. R. 1476; *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U. S. 459, 81 L. ed. 1223.

⁵ *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."⁶

The clause does not confer new rights but is designed to furnish additional guaranty against encroachment by the states on fundamental rights belonging to citizens of the United States or to other individuals as distinguished from citizenship of the several states. It is not intended to hamper the states in the discretionary exercise of their appropriate sovereign powers, unless substantial rights are arbitrarily invaded by illegal and oppressive exactions and discriminations.⁷ It will not prevent an unlawful denial by state action of a right to state political office.⁸ It is not designed as a safeguard against the conduct of private persons or individuals,⁹ or their right to contract,¹⁰ and does not add anything to the rights which one citizen has under the Constitution against another.¹¹

The term "any person" applies to all persons within the state.¹² While the primary object of the amendment was to secure the full equality of civil rights to the colored race, it is not restricted to that purpose.¹³ It includes all persons of any class or race.¹⁴

⁶ *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923.

⁷ *Hinebaugh v. James*, 119 W. Va. 162, 192 S. E. 177, 112 A. L. R. 59; *State ex rel. Hosack v. Yokum*, 136 Fla. 246, 186 So. 448, 121 A. L. R. 270.

⁸ *Snowden v. Hughes*, 321 U. S. 1, 88 L. ed. 497.

⁹ *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239, 76 L. ed. 265.

¹⁰ *Meade v. Dennistone*, 173 Md. 295, 196 A. 330, 114 A. L. R. 1227.

¹¹ *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

¹² *Northern Pac. Ry. Co. v. Adams County*, 1 F. Supp. 163.

¹³ *Holden v. Hardy*, 169 U. S. 382, 42 L. ed. 780.

¹⁴ *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. 385.

It includes Japanese and Chinese,¹⁵ Jews and Gentiles,¹⁶ aliens and nonresidents,¹⁷ and women as well as men.¹⁸ It includes corporations.¹⁹ In fact, the provision is universal in its application to all persons within the territorial jurisdiction of the state.²⁰ A municipality, being a subdivision of the state, is not a person within the meaning of the guaranty.²¹

This "equal protection" clause should be distinguished from the due process clause, which will be discussed in Chapter 22. The guaranty of the former was aimed at undue favor and individual or class privilege. It sought an equality of treatment of all persons. On the other hand, the "due process clause" requires that every man shall have the protection of his day in court and the benefit of the general law. This means a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial.²²

§ 270. Equal Protection of Colored Citizens. The Fourteenth Amendment, adopted soon after the close of the Civil War, had its origin in the purpose to secure to the people of the colored race the full enjoyment of their civil rights.²³ It forbade discriminations against persons of African descent in respect to their treatment in the courts, at the polls, in the schools, theaters, hotels, and all of the ordinary rights and privileges of individuals before the law.²⁴

The rights guaranteed by this provision are more properly described as an equality of rights rather than identity of rights.²⁵ The state may establish separate schools for white children and colored children and require each to attend the school of his race,

¹⁵ Re Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L. R. A. (N. S.) 604.

¹⁶ Cohn v. Townsend, 48 Misc. 47, 94 N. Y. S. 817.

¹⁷ Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220.

¹⁸ Carrithers v. Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. (N. S.) 421.

¹⁹ Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 82 L. ed. 673.

²⁰ Yick Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 220.

²¹ Shelby v. City of Pensacola, 112 Fla. 584, 151 So. 53.

²² Truax v. Corrigan, 275 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375.

²³ Civil Right Cases, 109 U. S. 3, 27 L. ed. 835; Santa Clara County v. Southern Pac. R. Co., 18 Fed. 385.

²⁴ Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. ed. 208; Nixon v. Herndon, 273 U. S. 536, 71 L. ed. 759; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L. R. A. 1918 C 210, Ann. Cas. 1918 A 1201; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

²⁵ Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, L. R. A. 1915 A 828.

provided the accommodations, advantages and opportunities are equal.²⁶ A railroad company or other common carrier may provide separate coaches, separate waiting rooms and other separate accommodations for white and colored passengers, provided that there are equally desirable accommodations for all who pay the same fare.²⁷ Discrimination against colored passengers having first-class tickets, refusing them accommodations equal in comforts and conveniences to those afforded first-class white passengers, constitutes a violation of the Interstate Commerce Act, as well as an invasion of their fundamental rights guaranteed by the Fourteenth Amendment.²⁸ A law, declaring illegal the intermarriage of a negro and a white person,²⁹ and an act providing greater punishment for the crime of adultery between a white person and a negro than between persons of the same race,³⁰ were held not to deny any person the equal protection of the laws.

But a municipal ordinance, prohibiting any white or colored person from moving into or occupying as a residence or as a place of public assembly any house in a block upon which a greater number of houses are occupied by persons of the opposite race, was held to violate this guaranty.³¹ However, the same result may be obtained through covenants running with the land contained in deeds since the prohibition is addressed to the states and not to individuals. A state cannot forbid a negro from participating in a primary election.³²

The extent to which the state may go under the guaranty was expressed by Justice Brown. "When the government has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress," he observed, "it has accomplished the end for which it is organized and performed all the functions respecting social advantages with which it is endowed. . . . If the civil and political rights of both races

²⁶ *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895.

²⁷ *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 59 L. ed. 169.

²⁸ *Mitchell v. United States*, 313 U. S. 80, 85 L. ed. 1201.

²⁹ *State v. Bell*, 7 Baxt. (Tenn.) 9, 32 Am. Rep. 549.

³⁰ *Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 207.

³¹ *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, L. R. A. 1918 C 210, Ann. Cas. 1918 A 1201; *Clinard v. Winston-Salem*, 217 N. C. 119, 6 S. E. (2d) 867, 126 A. L. R. 634.

³² *Corrigan v. Buckley*, 271 U. S. 323, 70 L. ed. 969; *Nixon v. Herndon*, 273 U. S. 536, 72 L. ed. 172; *Smith v. Allwright*, 321 U. S. 649, 88 L. ed. 987, 151 A. L. R. 1110.

be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."³³

§ 271. Classification and Class Legislation. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons, arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.³⁴

It is not the purpose of the equal protection clause to take from the states the right or the power to classify the subjects of legislation,³⁵ or to classify persons and objects to accomplish such a result.³⁶ "Under our constitutional system, the states, in determining the reach and scope of particular legislation, need not provide abstract symmetry," observed Justice Douglas, discussing this clause, "They may mark and set apart the classes and types of problems according to the needs and as dictated and suggested by experience."³⁷ Classification is an inherent power of legislation, limited only by the Constitution and the judicial constructions thereunder.

A classification must not be arbitrary, artificial or evasive and there must be a reasonable, natural and substantial distinction in the nature of the class or classes upon which the law operates. In respect to such distinctions, a legislative body has a wide discretion and an act will not be held invalid unless the classification is clearly unreasonable and arbitrary.³⁸ That the law will work a hardship is not enough. Many laws have that effect³⁹ and the

³³ Plessy v. Furgeson, 163 U. S. 537, 41 L. ed. 256.

³⁴ Monoponier Co. v. City of Los Angeles, 33 Cal. App. 675, 166 Pac. 387.

³⁵ Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A. L. R. 933.

³⁶ Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L. R. A. 351.

³⁷ Skinner v. Oklahoma, 316 U. S. 535, 86 L. ed. 1655.

³⁸ State v. Norval Hotel Co., 103

Ohio St. 361, 133 N. E. 75, 19 A. L. R. 637; Markendorf v. Friedman, 280 Ky. 484, 133 S. W. (2d) 516, 127 A. L. R. 416; Radice v. New York, 264 U. S. 292, 68 L. ed. 690 (statute prohibiting employment of women in restaurants between 10 p. m. and 6 a. m. held valid); Murphy, Inc. v. Westport, 131 Conn. 292, 40 A. (2d) 177, 156 A. L. R. 568.

³⁹ Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A. L. R. 933.

greater part of all legislation is discriminatory in the extent to which it operates, the manner in which it applies or the objects sought to be attained by it.⁴⁰ To justify the interposition of the authority of the state in enacting regulatory measures, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference.⁴¹

What classification is reasonable, natural or substantial rests in the discretion of the legislative body in the first instance and it is the province of the courts to adjudicate when it should be classed as arbitrary, artificial or evasive.⁴² The courts have held the following classifications to be valid: classification of persons according to their fitness to carry on a particular business, such as license laws;⁴³ legislation which is limited as to the territory in which it operates (territorial uniformity is not required);⁴⁴ population, such as the dividing of municipalities into classes;⁴⁵ numbers, such as requiring a \$500 fee for each additional agent of a foreign insurance company beyond a prescribed limit;⁴⁶ exemptions of limited amount, such as a debtor's homestead, books and library of a lawyer or household furniture, automobile or other personal property;⁴⁷ personal qualifications, including sex,⁴⁸ minority,⁴⁹ race and color,⁵⁰ military service,⁵¹ alienage,⁵² member-

⁴⁰ *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917 A 495, Ann. Cas. 1917 E 210.

⁴¹ *Carter v. State Tax Commission*, 98 Utah 96, 96 P. (2d) 727, 126 A. L. R. 1402; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 73 L. ed. 184 (statute requiring the filing of the constitution, by-laws, rules and roster of membership of secret societies such as the Ku Klux Klan held valid).

⁴² *Re Opinion of Justices*, 303 Mass. 631, 22 N. E. (2d) 49, 123 A. L. R. 199.

⁴³ *Collins v. Texas*, 223 U. S. 288, 56 L. ed. 439 (osteopaths); *People v. Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718 (plumbers).

⁴⁴ *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231; *Buck v. Bell*, 143 Va. 310, 130 S. E. 516, 51 A. L. R. 855.

⁴⁵ *Bishop v. Tulsa*, 21 Okla. Cr. R. 457, 209 Pac. 228, 27 A. L. R. 1008; *Pabst Corp. v. City of Milwaukee*, 190 Wis. 349, 208 N. W. 493, 45 A. L. R. 1164.

⁴⁶ *Hebring v. Lee*, 280 U. S. 111, 74 L. ed. 217, 64 A. L. R. 1430.

⁴⁷ *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491.

⁴⁸ *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. ed. 350.

⁴⁹ *Re Morgan*, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269.

⁵⁰ *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895.

⁵¹ *Marallis v. Chicago*, 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222.

⁵² *Ohio ex rel. Clarke v. Deckerbach*, 274 U. S. 392, 71 L. ed. 1115.

ship in labor unions; ⁵³ occupations, businesses, professions or other pursuits; ⁵⁴ farmers and dealers in dairy products; ⁵⁵ corporations; ⁵⁶ buildings; ⁵⁷ and taxation, such as specific taxes on different trades and professions ⁵⁸ and real estate, personal property, payrolls, income, occupations, etc., taxed in different ways. ⁵⁹

§ 272. **Special Burdens, Privileges, and Immunities.** Privileges and immunities are synonymous terms and mean a right conferred peculiar to some individual or body; a favor granted; a special privilege; in short, an affirmative act of selection of special subjects of favors not enjoyed by citizens in general under the Federal Constitution or under a state Constitution. ⁶⁰

⁵³ *Commonwealth v. Libbey*, 216 Mass. 356, 103 N. E. 923, 49 L. R. A. (N. S.) 879, Ann. Cas. 1915 B 659.

⁵⁴ *Semler v. Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086 (dentistry); *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (dry cleaning); *Carter v. State Tax Commission*, 98 Utah 96, 96 P. (2d) 727, 126 A. L. R. 1402; *Carter v. State Tax Commission*, 98 Utah 96, 96 P. (2d) 727, 126 A. L. R. 1402 (motor vehicles); *Sedalia ex rel. Bauman v. Standard Oil Co. (C. C. A.)* 66 F. (2d) 757, 95 A. L. R. 1514 (gasoline sold outside of city); *Louisiana State Medical Examiners v. Fife*, 162 La. 681, 111 So. 58, 54 A. L. R. 594 (physicians and surgeons, chiropractors).

⁵⁵ *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917 A 495, Ann. Cas. 1917 E 210; *State ex rel. Chase v. Clausen*, 110 Wash. 525, 188 Pac. 538, 14 A. L. R. 1133; *Adams v. Milwaukee*, 228 U. S. 572, 57 L. ed. 971; *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.

⁵⁶ *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580, 79 L.

ed. 1070 (foreign insurance company); *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759, Ann. Cas. 1914 B 965.

⁵⁷ *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735.

⁵⁸ *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. ed. 1109. But see *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U. S. 459, 81 L. ed. 1223; *Madden v. Kentucky*, 309 U. S. 83, 84 L. ed. 590 (overruling *Colgate v. Harvey*, 296 U. S. 404, 80 L. ed. 299, 102 A. L. R. 54).

⁵⁹ *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. ed. 1245, 109 A. L. R. 1327; *Great Atlantic & Pacific Tea Co. v. Grosejean*, 301 U. S. 412, 81 L. ed. 1193, 112 A. L. R. 293; *Stebbins v. Riley*, 268 U. S. 137, 69 L. ed. 884, 44 A. L. R. 1454; *New York v. Latrobe*, 279 U. S. 421, 73 L. ed. 776, 65 A. L. R. 1341; *Lawrence v. State Tax Commission*, 286 U. S. 276, 76 L. ed. 1102, 87 A. L. R. 374.

⁶⁰ *Hammer v. State*, 173 Ind. 199, 89 N. E. 850, 140 Am. St. Rep. 248.

Every citizen has the right to share the common benefits of the government and legislation may not arbitrarily confer upon one person or class benefits from which others in a like situation are excluded, or impose burdens on one class not imposed on others.⁶¹ Thus a statute purporting to deprive one class of manufacturers of the right to employ women for more than a specified number of hours a day, while it leaves manufacturers of other classes free from any prohibitions on the subject, there being no reason why it should apply to one class rather than to another, is void.⁶² Where the classification, however, is reasonable, and based on some difference in the business of the several classes, which is distinctly inherent and singularly applicable to them, the legislation is valid.⁶³⁻⁶⁵

When the public purpose of such grants is apparent, the courts will generally sustain them. For example, exclusive privileges have been granted to erect slaughterhouses,⁶⁶ to operate ferries,⁶⁷ to dispense intoxicating liquors,⁶⁸ to remove garbage,⁶⁹ and to exercise the power of eminent domain.⁷⁰ On the other hand, if there are other general classes situated in all respects like the class benefited by the statute, with the same essential needs and character which indicate the necessity or expediency of protection for the favored class, and legislation discriminates, it cannot stand.⁷¹ For

⁶¹ *State v. Nashville, C. & St. L. R. Co.*, 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912 D 805.

⁶² *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315.

⁶³⁻⁶⁵ *State v. Nashville, C. & St. L. R. Co.*, 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912 D 805; *State, ex rel. Garrahad v. Dering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, Ann. Cas. 1917 D 642; *Nitka v. Western Union Tel. Co.*, 149 Wis. 106, 135 N. W. 492, 49 L. R. A. (N. S.) 337, Ann. Cas. 1913 C 863; *Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917 E 1165; *State*

v. Richereek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 49, 10 Ann. Cas. 899.

⁶⁶ *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394.

⁶⁷ *Patterson v. Wollman*, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

⁶⁸ *Riggins v. District Court*, 89 Utah 183, 51 P. (2d) 645.

⁶⁹ *Jansen Farms v. City of Indianapolis*, 202 Ind. 138, 171 N. E. 199, 72 A. L. R. 514.

⁷⁰ *Louisville Ry. Co. v. Louisville Fire & Life Protection Ass'n*, 151 Ky. 644, 152 S. W. 799, 43 L. R. A. (N. S.) 600, Ann. Cas. 1915 A 89.

⁷¹ *McErlain v. Taylor*, 207 Ind. 240, 192 N. E. 260, 94 A. L. R. 1284.

example, a statute, creating a preference in the distribution of the assets of an insolvent employer in favor of manual and mechanical laborers as against all other types of wage-earning employees, was held unconstitutional.⁷² A statute, conferring upon registered pharmacists the exclusive right under permit to sell domestic remedies and proprietary medicines, also was adjudged invalid.⁷³ The same was true of a statute making the failure of a convict, discharged from the penitentiary, to leave the county in which the penitentiary was located within a specified time, a misdemeanor. It deprived him of the equal protection of the laws.⁷⁴

The constitutions of the several states also forbid the granting of special privileges and immunities.⁷⁵ The provisions of these constitutions are the antithesis of the Fourteenth Amendment in that they forbid the granting of immunities and exemptions from burdens, which, under like circumstances and conditions, are not granted to all citizens. In other words, the one prevents the curtailment of constitutional rights, while the other prevents the enlargement of the rights of some in discrimination against the rights of others.⁷⁶ In the final analysis, what is required by both Federal and state constitutions is that all persons shall be treated alike under like circumstances.⁷⁷

§ 273. Discriminations Against Nonresidents and Aliens. This guaranty secures to every person within the jurisdiction of the state, whether a citizen or resident or not, the protection of its laws equally with its own citizens.⁷⁸ It is the right and privilege

⁷² *McErlain v. Taylor*, 207 Ind. 240, 192 N. E. 260, 94 A. L. R. 1284.

⁷³ *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238.

⁷⁴ *Ex parte Schatz*, 307 Mo. 67, 269 S. W. 383, 38 A. L. R. 1032.

⁷⁵ *State Tax Commissioners v. Jackson*, 282 U. S. 527, 75 L. ed. 1248, 73 A. L. R. 1464; *Storen v. Sexton*, 209 Ind. 589, 200 N. E. 251, 104 A. L. R. 1359. For example, see Constitution of Kansas (Bill of Rights) § 2; and Constitution of Idaho, Art. I, § 2.

⁷⁶ Constitution of Indiana, Art.

I, § 23; *Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917 E 1165.

⁷⁷ *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Bolivar Township Board of Finance v. Hawkins*, 207 Ind. 171, 191 N. E. 158, 96 A. L. R. 271.

⁷⁸ *Steed v. Harvey*, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789; *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072. But see *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432. For a discussion of the power of Congress over aliens, see Chap. 9, § 89, supra.

of the nonresident to have his life and liberty, as well as his property situated in the state, protected under the state's laws the same as that of its citizens and residents.⁷⁹ This does not mean that a nonresident may not be called upon to share the public burdens of the state, provided that the burden rests equally upon all and no discrimination is made against the nonresident as such. For example, a nonresident landowner must pay taxes.⁸⁰ A citizen of another state receives the equal protection of the laws when the state law, with its benefits and its obligations, is impartially administered and when, as respects his property, he has received the same measure of right as that awarded its citizens.⁸¹ But a state may not exact from a foreign corporation as a condition of engaging in business within its limits the payment of a tax which is an infringement of its rights under the Constitution of the United States.⁸²

This guaranty does not prevent a state from exercising its police power. It may regulate the use of its highways by nonresident operators of motor vehicles and it may require any such operator to secure a license,⁸³ but a state may not require a driver of a Federal government motor truck to secure a license, as a state may not tax an instrumentality of the Federal government.⁸⁴ It may require professional men to be licensed before practicing their profession.⁸⁵ It may require licenses to fish or hunt from non-residents not required of residents.⁸⁶ It may refuse a nonresident a license to sell liquor, or may tax the privilege of importing

⁷⁹ *Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

⁸⁰ *State v. Mallory*, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852.

⁸¹ *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490.

⁸² *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 71 L. ed. 372, 49 A. L. R. 713. See also *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U. S. 544, 67 L. ed. 1112 (statute requiring foreign corporations to submit to an examination before trial).

⁸³ *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439; *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92, 77 L. ed. 1053.

⁸⁴ *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126.

⁸⁵ *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915 D 538.

⁸⁶ *Haavik v. Alaska Packers Ass'n*, 263 U. S. 510, 68 L. ed. 414.

beer,⁸⁷ and it may provide for a constructive service of summons on a nonresident.⁸⁸

A statute, which discriminates unjustly against residents in favor of nonresidents, also violates the guaranty. For example, an act which prohibits the advertising of cigarettes and cigarette papers in a periodical published in a state while permitting newspapers containing such advertising, but published without the state, to be sold within the state, is an invalid discrimination.⁸⁹ The discrimination, however, must be an actual discrimination against the resident in favor of a nonresident and a statute requiring both nonresident and resident alike to pay a license fee under an Automobile Caravan Act but which allows the nonresident to use the highways without an additional fee, while the resident is required to pay a dealer's registration fee, is not invalid. This registration fee entitled the resident dealer to receive an allotted number of plates for use on automobiles traversing the highways of the state and, as a matter of fact, the resident dealer used the highways constantly while the nonresident used them only occasionally.⁹⁰

Aliens are protected by this guaranty.⁹¹ The state may not deny them the means of earning a livelihood. It cannot deny them the right to labor and to work and a statute, requiring employers of more than five workers to employ not less than 80% qualified electors, was adjudged invalid.⁹² The clause does not forbid every distinction in the laws of the states against aliens and, although it forbids irrational discriminations, it does not follow that race and allegiance may not, in some instances, be made the basis of a

⁸⁷ *DeGrazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059; *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38; *Hinebaugh v. James*, 119 W. Va. 162, 192 S. E. 177, 112 A. L. R. 59.

⁸⁸ *Davidson v. Doherty & Co.*, 214 Iowa, 739, 241 N. W. 700, 91 A. L. R. 1308.

⁸⁹ *Little v. Smith*, 124 Kan. 237, 257 Pac. 959, 57 A. L. R. 100.

⁹⁰ *Wallace v. Pfost*, 57 Idaho 279, 65 P. (2d) 725, 110 A. L. R. 613.

⁹¹ *Cockrill v. California*, 268 U. S. 258, 69 L. ed. 944; *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 581.

⁹² *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916 D 545, Ann. Cas. 1917 B 283; *Ohio ex rel. Clarke v. Deckebach*, 274 U. S. 392, 71 L. ed. 1115.

permitted classification.⁹³ For example, an auctioneer's license may be refused to an alien. He may be denied a license to sell intoxicating liquor or to run a pool hall⁹⁴ or to operate motor busses.⁹⁵ An alien, who has not declared his intention to become a citizen, may be denied the right to own farm land⁹⁶ or to acquire stock in a corporation holding land for agriculture purposes.⁹⁷ These discriminations are valid under the police power of the state and the rule established by Congress on the subject of naturalization of aliens, which, of itself, furnishes a reasonable basis for classification in a state law.⁹⁸

§ 274. Discrimination in the Administration of the Laws.

Discrimination may exist in the administration of the laws and it is the purpose of the equal protection clause to secure all the inhabitants of the state from intentional and arbitrary discrimination arising in their improper or prejudiced execution, as well as by the express terms of the law itself.⁹⁹ The validity or invalidity of a statute often depends on how it is construed and applied.¹⁰⁰ It may be valid when given a particular application and invalid when given another.¹⁰¹

Speaking of the exclusion of negroes from jury duty, Chief Justice Hughes asserted: "Whenever, by any action of a state, whether through its legislature, through its courts or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in criminal prosecution of a person of the African

⁹³ Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255.

⁹⁴ Wright v. May, 127 Minn. 150, 149 N. W. 9, L. R. A. 1915 B 151; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. ed. 1115.

⁹⁵ Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L. R. A. (N. S.) 726, Ann. Cas. 1913 D 629.

⁹⁶ Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255. See also DeCano v. State of Washington, 7 Wash. (2d) 613, 110 P. (2d) 627.

⁹⁷ Frick v. Webb, 263 U. S. 326, 68 L. ed. 323.

⁹⁸ Terrace v. Thompson, 263 U.

S. 197, 68 L. ed. 255; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. ed. 1115.

⁹⁹ Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 62 L. ed. 1154; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220. See also Douglas v. Noble, 261 U. S. 165, 67 L. ed. 590.

¹⁰⁰ Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417.

¹⁰¹ Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411; St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 5 Ann. Cas. 909.

race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States."¹⁰² It is well understood that a statute or provision, not objectionable on its face, may be adjudged unconstitutional because of its effect in operation¹⁰³ or because it vests in officers, boards or administrative agencies unregulated official discretion.¹⁰⁴

Minor inequities, erroneous decisions or mere errors of judgment by officials will not be sufficient to support a claim of discrimination. There must be something more. There must be some act which, in effect, amounts to an intentional violation of the essential principle of constitutional equality.¹⁰⁵ For example, it is not sufficient to show that officers failed to enforce an ordinance against one corporation in the same manner as it was enforced against another.¹⁰⁷

§ 275. **Equal Protection and Taxation.** There is no general supervision on the part of the Federal government over state taxation and each state, speaking generally, has the freedom of a sovereign, both as to objects and methods.¹⁰⁸ The Fourteenth Amendment was not designed to prevent a state from establishing a system of taxation or from effecting a change in its system in all proper and reasonable ways, nor to require the states to adopt an ironclad rule of equality to prevent the classification of property for purposes of taxation or the imposition of different rates upon different classes. It is sufficient if there is no discrimination in favor of one as against another of the same class and the method for the assessment and collection of the tax is not inconsistent with natural justice.¹⁰⁹

¹⁰² *Norris v. Alabama*, 294 U. S. 587, 79 L. ed. 1074; *Hill v. Texas*, 316 U. S. 400, 86 L. ed. 1559; *Akins v. Texas*, 325 U. S. 398, 89 L. ed. 1692 (number of negroes on grand jury may be limited). See also *Strandu v. West Virginia*, 100 U. S. 303, 25 L. ed. 664 (state law limited jury service to white male citizens).

¹⁰³ *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912 D 22.

¹⁰⁴ *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *St. Louis*

v. Allen, 275 Mo. 501, 204 S. W. 1083, L. R. A. 1918 F 1110.

¹⁰⁶ *Sunday Lake Iron Co. v. Wakefield Township*, 247 U. S. 350, 62 L. ed. 1154; *Schreiber v. Cook County*, 388 Ill. 297, 58 N. E. (2d) 40, 155 A. L. R. 1162.

¹⁰⁷ *Mackay Telegraph & Cable Co. v. City of Little Rock*, 250 U. S. 94, 63 L. ed. 863.

¹⁰⁸ *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744.

¹⁰⁹ *State v. Frear*, 148 Wis. 456, 134 N. W. 673, L. R. A. 1915 B 569, Ann. Cas. 1913 A 1147. See

"A state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received," remarked Justice Clark, "as to amount to the arbitrary taking of property without compensation,—to spoliation under the guise of exerting the power of taxing."¹¹⁰

Classification for taxation must be based upon natural reasons, upon reasons which normally inhere in the subject matter, upon real differences existing between the classes and so as to produce no distinction between members of the same class.¹¹¹ But a tax levied upon a given class, to the exclusion of other classes, and so high as to discourage the activity burdened, may be justified, upon the basis of public policy which sees an advantage to the general welfare in the encouragement of one activity or business and the discouragement of others.¹¹²

The following examples will illustrate valid classifications. A license fee increasing in amount with the number of stores operated;¹¹³ a state income tax, taxing income from dividends from stock of a corporation not subject to a state franchise tax and exempting those subject to the state franchise tax;¹¹⁴ a statute making a distinction between devises and successions to lineal heirs and collateral heirs or strangers of the blood;¹¹⁵ a tax graduated in proportion to the amount of the inheritance;¹¹⁶ taxation of common carriers by motor vehicles operating over regular routes between fixed termini on a different basis than applied to other carriers;¹¹⁷ and an occupation tax, if there are substantial differ-

also *New York Rapid Transit Corp. v. New York*, 303 U. S. 573, 82 L. ed. 1024.

¹¹⁰ *Dane v. Jackson*, 256 U. S. 589, 65 L. ed. 1107. See also Chap. 22, § 282, *infra* (taxation under due process clause).

¹¹¹ *Miles v. Department of Treasury* (Ind.), 193 N. E. 855, 97 A. L. R. 1474, modified 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359; *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. ed. 1109; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927 (tax upon foreign corporation but not upon resident individuals operating taxicabs held invalid).

¹¹² *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. ed. 780; *State Board of Tax Com'rs v. Jackson*, 283 U. S. 527, 75 L. ed. 1248, 73 A. L. R. 1464.

¹¹³ *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. ed. 780.

¹¹⁴ *Colgate v. Harvey*, 296 U. S. 404, 80 L. ed. 299.

¹¹⁵ *Stebbins v. Riley*, 268 U. S. 137, 69 L. ed. 884, 44 A. L. R. 1454.

¹¹⁶ *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121.

¹¹⁷ *Bekins Van Lines v. Riley*, 280 U. S. 80, 74 L. ed. 178.

ences between the occupations separately classified.¹¹⁸ But the intentional and arbitrary assessment or taxation of one class of property or one taxpayer's property at a higher rate than another is invalid. For example, the equal protection of the laws was denied by the assessment of the property of a bridge company at full value while other property in the county was assessed at 55/100 of its value.¹¹⁹

§ 276. **Equal Protection in Legal Proceedings.** The equal protection of the laws in legal proceedings is secured when the laws of the state operate on all persons alike and do not subject the individual to an arbitrary exercise of the powers of government;¹²⁰ when its courts are open to every one on the same terms; when it assures to everyone the same rules of evidence and modes of procedure; when it secures to all persons their civil rights;¹²¹ and when, in the administration of criminal justice, no different or higher punishment is imposed upon one than is prescribed for all under like offenses.¹²² This means that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection, and without discrimination.¹²³

The guaranty does not secure to all persons in the United States the same laws and remedies.¹²⁴ It does not prevent the state from fixing the venue of civil actions.¹²⁵ It does not prevent the state from prescribing the qualifications of jurors or granting or denying trial by jury.¹²⁶ Other rights not restricted or denied by the

¹¹⁸ *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. ed. 929, 85 A. L. R. 699.

¹¹⁹ *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979. See also *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 78 L. ed. 1411.

¹²⁰ *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485; *Marallis v. Chicago*, 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222.

¹²¹ *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386.

¹²² *Marallis v. Chicago*, 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222.

¹²³ *Universal Adjustment Corp. v. Midland Bank, London, England*, 281 Mass. 303, 184 N. E. 152, 87 A. L. R. 1407.

¹²⁴ *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597.

¹²⁵ *Bain Peanut Co. v. Pinson*, 282, U. S. 499, 75 L. ed. 482.

¹²⁶ *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 67 L. ed. 961; *In re Gilli*, 110 Misc. 45, 179 N. Y. S. 795; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474, 43 L. ed. 520.

guaranty are the right of litigants to follow the remedies provided by law;¹²⁷ and the right of the state to adopt a combined system of law and equity procedure or the right to require a nonresident individual to furnish special security before appearing in an action while a corporate defendant is not required to do so.¹²⁸ The guaranty does not assure uniformity in judicial decisions or deny the state the right to determine the jurisdiction of its courts or to provide for appellate procedure.¹²⁹ But procedural provisions, which discriminate arbitrarily against either individuals or corporations, are invalid. For example, a statute permitting foreign corporations to be sued within any county of the state, whether they do business in the county or not, while domestic corporations may be sued only in case they are doing business in the county, is a denial of the equal protection of the laws.¹³⁰

¹²⁷ *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

¹²⁸ *Ownbey v. Morgan*, 256 U. S. 94, 65 L. ed. 837, 17 A. L. R. 873.

¹²⁹ *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U. S.

100, 64 L. ed. 467, 10 A. L. R. 892; *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U. S. 74, 74 L. ed. 710, 66 A. L. R. 1460.

¹³⁰ *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. ed. 1165.

CHAPTER 22

DUE PROCESS OF LAW

This phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.

—Justice Roberts

§ 277. **Origin.** The guaranty that no person should be deprived of his property except by the due process of law was a principle of the Anglican system of jurisprudence brought to America as a part of the common law.¹ Older than the Magna Charta,² it was included in this historic document as Chapter 39 which provided that "no free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."³

In England, this requirement, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law.⁴ In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, liberty, or property,⁵ and to secure him from the arbitrary exercise of the powers of government unrestrained by the principles of distributive justice.⁶ In this

¹ *Murray v. Hoboken Land Co.*, 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

² *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 57 L. ed. 1427.

³ *Taswell-Langmead*, English Constitutional History (8th Ed.) 113; *Poulsen v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673. See generally Mott, Due Process of Law, Chap. III.

⁴ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113, 89 A. L. R. 1398.

⁵ *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623.

⁶ *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639.

country—as in England the courts have held the phrases “due process of law” and “law of the land” to be synonymous, and intended, in addition to other guaranties of private rights, to give increased security against arbitrary deprivation of life or liberty or arbitrary spoliation of property.⁷

§ 278. Constitutional Guaranties. The guaranty of due process of law was written into the Constitution of the United States in the Fifth Amendment, which provided that “no person . . . shall be deprived of life, liberty or property without due process of law.” This amendment was not a limitation upon the powers of the states,⁸ but three quarters of a century later a like prohibition was placed upon them. The Fourteenth Amendment, adopted in 1868, provided that “no state shall deprive any person of life, liberty and property without due process of law,” and this prohibition applies to all state agencies, whether legislative, executive or judicial.⁹ In general the meaning of the term “due process” is the same in both of these amendments, except that in the Fourteenth Amendment the term has been given a somewhat wider meaning. The courts have held that this amendment includes such substantive rights as religious freedom, freedom of speech, freedom of the press, the right of one accused of crime to have the benefit of counsel, as well as the taking of private property by the states for public use without just compensation.¹⁰ The protection of these substantive rights has sometimes been denominated “substantive due process,” to distinguish it from procedural due process.¹¹

This guaranty has two aspects, one political and one legal. (a) It is considered as a test by which to determine whether a statute is valid or invalid under the provisions of the Fourteenth Amendment. In this respect it is the expression of the doctrine that there are certain fundamental principles of right and justice

⁷ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463.

⁸ *State v. Henry*, 37 N. M. 536, 25 P. (2d) 204, 90 A. L. R. 805.

⁹ *Ladner v. Siegel Co.*, 298 Pa. 487, 48 Atl. 699, 68 A. L. R. 1172; *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113, 89 A. L. R. 1398.

¹⁰ *Gitlow v. People of New York*, 268 U. S. 652, 69 L. ed. 1138; *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 84 L. ed. 1375, 127

A. L. R. 1493; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979; *Palko v. Connecticut*, 302 U. S. 319, 82 L. ed. 288. See also Chap. 20, § 256, *supra*, Chap. 23, § 294, *infra*, and Chap. 24, § 305, *par. (d)*, *infra*.

¹¹ *Anderson Nat. Bank v. Luckett*, 321 U. S. 233, 88 L. ed. 692, 151 A. L. R. 824 (procedural due process).

which a legislature must not violate and which the Fourteenth Amendment was meant to secure. Any purely arbitrary, oppressive, confiscatory, or capricious exercise of legislative power, amounting to a wrongful invasion of liberty or property rights is not due process of law and is invalid; and (b) the process of law by which a statute admittedly valid is administered. This means an orderly proceeding according to established rules which do not violate fundamental rights, and a general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike is due process.¹² The following requirements are generally considered essential elements of due process: Notice, summons or other process; a hearing, granting an opportunity to be heard and to defend, in an orderly proceeding before a court or other tribunal, having jurisdiction of the cause and which renders judgment only after trial.¹³

§ 279. Due Process and the Police Power. It is elementary that the due process clause of the Fourteenth Amendment, as well as that of the Fifth Amendment, does not restrain the states in the exercise of their legitimate police powers.¹⁴ Both liberty and property are subject to the exercise of these powers.¹⁵

The exercise of the police powers, however, is not unrestricted. It is limited to enactments having reference to the public health, comfort, safety and welfare. It must not be arbitrary, unreasonable, or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained.¹⁶ Neither may it violate the rights

¹² *State v. Henry*, 37 N. M. 536, 25 P. (2d) 204, 90 A. L. R. 805; *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113, 89 A. L. R. 1398.

¹³ *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, *Ladner v. Siegel Co.* 298 Pa. 487, 48 Atl. 699, 68 A. L. R. 1172; *Board of Water Commissioners v. Johnson*, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024; *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. ed. 674, 90 A. L. R. 575; *Chicago v. Cohn*, 326 Ill. 372, 158 N. E. 118, 55 A. L. R. 196; *Parish v.*

East Coast Cedar Co. 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718; *Anderson Nat. Bank v. Lucket*, 321 U. S. 233, 88 L. ed. 692, 151 A. L. R. 824.

¹⁴ *Pacific Gas & Electric Co. v. Police Court*, 251 U. S. 22, 64 L. ed. 112.

¹⁵ *Burns Baking Co. v. Bryan*, 264 U. S. 504, 68 L. ed. 813, 32 A. L. R. 661; *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. (2d) 67, 128 A. L. R. 1120.

¹⁶ *State Bank & Trust Co. v. Village of Wilmette*, 358 Ill. 311,

guaranteed by the Constitution of the United States, or interfere with the execution of the powers confided to the Federal government.¹⁷

The exercise of these powers is subject to judicial review. While it is the province of the legislative branch of the government to enact such measures as it deems desirable for the advancement of the public welfare or the protection of the public health and safety, the judiciary is the ultimate authority to determine whether the constitutional restraints have been violated.¹⁸

§ 280. Persons Protected. The guaranty is general in its application. It extends to all persons within the territorial limits of the United States and of the state in which the question arises, without regard to any differences of color, of race, or of nationality. It protects not only citizens, but also Indians,¹⁹ and aliens within the jurisdiction of the state.²⁰ It also applies to corporations in so far as their property rights are concerned, but so far as liberty is concerned the courts have held that the language of the guaranty does not apply. The liberty guaranteed is the liberty of natural persons rather than that of artificial persons.²¹ But so far as the state and its instrumentalities, municipal corporations and counties and other quasi-municipal corporations of the state, existing only for public purposes, are concerned, the guaranty does not apply.²²

193 N. E. 131, 96 A. L. R. 1327; New York Cent. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L. R. A. 1917 D 1, Ann. Cas. 1917 D 629.

¹⁷ *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

¹⁸ *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. (2d) 67, 128 A. L. R. 1120.

¹⁹ *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916 D 545, Ann. Cas. 1917 B 283; *United States v. Fisher*, 222 U. S. 204, 56 L. ed. 165.

²⁰ *Home Ins. Co. v. Dick*, 281 U. S. 397, 74 L. ed. 926, 74 A. L. R. 701; *Terrace v. Thompson*, 263 U. S. 197, 68 L. ed. 255.

²¹ *Universal Adjustment Corp. v. Midland Bank, London, England*,

281 Mass. 303, 184 N. E. 152, 87 A. L. R. 1407; *Liggett Co. v. Baldrige*, 278 U. S. 105, 73 L. ed. 203; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 51 L. ed. 520; *Asbury Hospital v. Cass County*, — U. S. —, 90 L. ed. — (a corporation is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Art. IV, § 2 of the Constitution or the Fourteenth Amendment).

²² *Sandel v. State*, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268; *Albright v. Board of Com'rs Douglas Co.*, 108 Kan. 184, 194 Pac. 913; *Chicago v. Knobel*, 232 Ill. 112, 83 N. E. 159.

The state may authorize suit against itself,²³ and its powers over the rights of the cities and counties and other quasi-municipal corporations²⁴ are unrestricted by the due process clause.²⁵

§ 281. **Liberty Protected.** This guaranty prohibits the deprivation of the liberty of the individual without due process of law.²⁶ The underlying axiom upon which the constitutional safeguards of personal liberty in the last analysis rests is that the government shall be one of laws, and it is the constitutional duty of the courts to be vigilant to detect, and to resist any encroachment, although petty, upon the fundamental rights, privileges and immunities of the people. For example, an official inquisition into a citizen's private affairs by the Securities and Exchange Commission was held unlawful because it was not for a disclosed and legitimate purpose and not based on specified grounds.²⁷ It is the civil liberties of a natural person, which may not be denied.²⁸ These liberties were defined and discussed at length in considering the protection of civil rights.²⁹

The liberty protected, however, is not an absolute one. It is a liberty safeguarded in an established social order, which requires the protection of law against evils that threaten the safety, health, morals, and general welfare of the people. It is subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted if the interest of the community meets this requirement. For example, a statute providing a process for fixing minimum wages for women and minors but not extending to men is not an arbitrary discrimination amounting to a denial of due process of law.³⁰ Neither is a state statute establishing a milk control board to regulate the minimum and maxi-

²³ *Sandel v. State*, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268.

²⁴ *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 29 A. L. R. 1471. See *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

²⁵ *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 29 A. L. R. 1471; *Morse v. United States*, 270 U. S. 151, 70 L. ed. 518.

²⁶ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330; *Bryant v.*

Brown, 151 Miss. 398, 118 So. 184, 60 A. L. R. 1325.

²⁷ *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 80 L. ed. 1015.

²⁸ *Bryant v. Brown*, 151 Miss. 398, 118 So. 184, 60 A. L. R. 1325; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 51 L. ed. 520.

²⁹ See Chap. 20.

³⁰ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

mum prices of milk, as the Constitution does not secure to anyone the liberty to conduct his business so as to injure the public at large or in fact any substantial group of people.³¹

§ 282. **Property and Property Rights Protected.** The protection of property and property rights under this guaranty raises two questions: (a) What property and property rights are protected; and (b) what amounts to a deprivation or taking.³²

The term property as used in the guaranty is a general term, embracing everything over which a person may have exclusive control or dominion.³³ It includes real and personal property, easements, franchises, hereditaments, and all forms of vested rights.³⁴ It has been held to include money,³⁵ a man's right to his calling,³⁶ the right to labor and to practice a profession,³⁷ and marital rights in property.³⁸ It includes not only the right to possess and enjoy property, but also the right to acquire it in any lawful mode by following any lawful pursuit which any inhabitant may choose,³⁹ as well as the right to sell and transfer it.⁴⁰ Public office is not property within the protection of the guaranty,⁴¹ and an officer, therefore, is not denied due process by his removal in the manner prescribed by statute,⁴² or by the abolition of the office before the expiration of the term.⁴³

³¹ *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.

³² *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623.

³³ *Delaware, L. & W. R. Co. v. Town of Morristown* (C. C. A.) 14 F. (2d) 257; *Butchers' Benev. Ass'n v. Crescent City Livestock Landing & Slaughter House Co.*, 16 Wall. 36, 21 L. ed. 39.

³⁴ *Josena v. Western Steel Car & Foundry Co.*, 249 Ill. 508, 94 N. E. 945; *Mongogna v. O'Dwyer*, 204 La. 1030, 16 So. (2d) 829, 152 A. L. R. 162.

³⁵ *Washington Co. v. Weld Co.*, 12 Colo. 152, 20 Pac. 273.

³⁶ *Butchers' Union Slaughterhouse & Live Stock Landing Co. v. Crescent City Livestock Landing & Slaughter House Co.*, 111 U. S. 746, 28 L. ed. 585.

³⁷ *Glenn v. Thaw*, 185 Fed. 345, 34 L. R. A. (N. S.) 894.

³⁸ *Hubbard v. Hubbard*, 77 Vt. 73, 58 Atl. 969, 107 Am. St. Rep. 749, 67 L. R. A. 969, 2 Ann. Cas. 315.

³⁹ *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340.

⁴⁰ *State v. Osborne*, 171 Iowa 678, 154 N. W. 294.

⁴¹ *Sanchez v. United States*, 216 U. S. 167, 54 L. ed. 432.

⁴² *United States v. Lane*, 232 U. S. 598, 58 L. ed. 748.

⁴³ *Hawkins v. Roberts*, 122 Ala. 130, 27 So. 327; *Att'y Gen. v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606; *State's Prison of North Carolina v. Day*, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.

What constitutes a taking or what amounts to deprivation without due process of law is frequently difficult to determine. This is true, especially where the question relates to property or to property rights of a quasi-public corporation and the extent to which they may be subjected to public control.⁴⁴ But as a general rule, it may be said that there is a taking when the act involves an actual interference with, or disturbance of property rights.⁴⁵ Comparatively insignificant takings do not amount to a deprivation.⁴⁶ The right to devote real estate to any legitimate use is within the protection of the guaranty, and the legislature may not under the guise of the police power impose restrictions that are unnecessary or unreasonable upon the use of private property or the pursuit of useful activities.⁴⁷ In fact, the owner of property cannot be deprived of the essential attributes of property, such as its acquisition through purchase, use and enjoyment, mortgage and sale.⁴⁸ Neither can he be deprived through confiscation of the actual increment of property, or the increment of the proceeds into which such property has been converted.⁴⁹

But a property is not taken without due process through the creation of liens, such as a lien to subcontractors, laborers, and to those who furnish materials to be used by the contractor in the construction of a building.⁵⁰ Confiscation of property by the United States or a state or forfeiture of property to the state are within the guaranty and do not meet the requirement of due process unless the owner is afforded an opportunity to contest the charge against him, and to show the nonliability of his property.⁵¹ The abatement of nuisances and the destruction of contraband or otherwise dangerous property is subject to due process, and the courts under their equity powers may proceed by injunction to en-

⁴⁴ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819.

⁴⁵ *School Town of Andrews v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023, Ann. Cas. 1915 B 1136.

⁴⁶ *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112.

⁴⁷ *Washington, ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210, 86 A. L. R. 654.

⁴⁸ *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210, 86 A. L. R.

654; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, L. R. A. 1918 C 210, Ann. Cas. 1918 A 1201; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263.

⁴⁹ *Henkels v. Sutherland*, 271 U. S. 298, 70 L. ed. 953, 51 A. L. R. 229.

⁵⁰ *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778.

⁵¹ *Henderson v. Distilled Spirits*, 14 Wall. 44, 20 L. ed. 815.

force such abatement.⁵² But a statute authorizing destruction of private property as a nuisance without any investigation, notice or hearing is void.⁵³ Property may be taken under the regulatory powers of the government, or under the police or military powers, or the taxing power.

The Fourteenth Amendment will not assure protection against injuries which are remote, contingent or speculative.⁵⁴

§ 283. Due Process of Law in Civil Proceedings. Legal proceedings of a civil nature, under the due process of law clause, need not be by any particular mode,⁵⁵ but authorities require that they shall be by a regular and orderly course of procedure⁵⁶ in a court of competent jurisdiction,⁵⁷ and that the defendant shall have notice,⁵⁸ and a full and fair opportunity to be heard and to defend, protect and enforce his rights.⁵⁹ Mere irregularities in the proceedings do not amount to a denial of due process.⁶⁰ The proceeding need not be a judicial proceeding,⁶¹ but may be a summary or special proceeding prescribed by statute.⁶² If it be before a board, commission or other administrative tribunal in the first instance, it is sufficient, provided an appeal to a court or other method of judicial review is authorized.⁶³ A jury trial is not essential.⁶⁴

⁵² *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. Rep. 446.

⁵³ *Miller v. Burch*, 32 Tex. 203, 5 Am. Rep. 242.

⁵⁴ See §§ 285, 287, 288; *Gange Lumber Co. v. Rowley*, — U. S. —, 90 L. ed. —.

⁵⁵ *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165.

⁵⁶ *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U. S. 285, 69 L. ed. 288.

⁵⁷ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

⁵⁸ *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. ed. 492; *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091 (requirement that nonresident shall appoint a resident attorney upon whom notice or summons might be served); *International Shoe Co. v. State of Washington*,

— U. S. —, 90 L. ed. — (notice may be served upon a foreign corporation by delivering the notice to its salesmen who are residents in the state or service may be made by registered mail).

⁵⁹ *American Land Co. v. Zeiss*, 219 U. S. 47, 55 L. ed. 82.

⁶⁰ *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467.

⁶¹ *Balch v. Glenn*, 85 Kan. 735, 119 Pac. 67, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913 A 406.

⁶² *State v. Barstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916 B 1014; *Grant Timber Co. v. Gray*, 236 U. S. 133, 59 L. ed. 501.

⁶³ *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. ed. 596; *Bowles v. Willingham*, 321 U. S. 503, 88 L. ed. 892.

⁶⁴ *Wagner Elec. Mfg. Co. v. Lyndon*, 262 U. S. 226, 67 L. ed. 961.

Remedies and defenses may be changed; new forms of procedure may be created, and restrictions against invoking the action of the courts may be removed,⁶⁵ but a statute destroying existing rights of action or existing defenses or forbidding the maintenance of actions is unconstitutional.⁶⁶ Rules of evidence and presumptions may be established or changed by statute, provided that the statute be not unreasonable in itself and not conclusive of the rights of a party.⁶⁷ Punishments for contempt of court are valid, even though judgment is pronounced immediately upon the commission of the offense, upon the judge's own knowledge of the facts and without any issue or trial in any form.⁶⁸ Judgments irregular or erroneous in point of law are not a denial of due process,⁶⁹ but a judgment rendered without the court having jurisdiction is void.⁷⁰

§ 284. Due Process in Criminal Proceedings. Due process of law in criminal proceedings requires that trials shall be conducted in the due course of the administration of justice according to the prescribed forms and judicial procedure of the state for the protection of the individual rights and liberties of its citizens.⁷¹ This means that there shall be a law creating and defining the offense; a court of competent jurisdiction and venue; a lawful arrest and an accusation in due form, which in the Federal court must be by presentment or indictment by a grand jury; notice and opportunity to answer the charge; and a trial according to the settled course of judicial proceedings.⁷²

The Fourteenth Amendment does not expressly require that the accused shall be represented by counsel,⁷³ but it is now generally the law under the Federal Constitution and under the constitutions

⁶⁵ *Hein v. Davidson*, 96 N. Y. 175, 48 Am. Rep. 612.

⁶⁶ *In re Flukes*, 157 Mo. 125, 57 S. W. 545, 51 L. R. A. 176, 80 Am. St. Rep. 619.

⁶⁷ *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, Ann. Cas. 1917 D 637.

⁶⁸ *In the Matter of David S. Terry*, 128 U. S. 289, 32 L. ed. 405.

⁶⁹ *Griggs v. Hanson*, 86 Kan. 632, 121 Pac. 1094, 52 L. R. A. (N. S.) 1161, Ann. Cas. 1913 C 242.

⁷⁰ *Booz v. Texas & P. R. Co.*, 250 Ill. 376, 95 N. E. 460; *Huetberg v. Anderson*, 252 Ill. 607, 97 N. E. 216.

⁷¹ *In re Maxwell*, 19 Utah 495, 57 Pac. 412.

⁷² See Chap. 24, *infra*; *Frank v. Mangum*, 237 U. S. 309, 59 L. ed. 969; *Tarantina v. Louisville & N. R. Co.*, 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913 B 1058; *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. ed. 888.

⁷³ *People v. Chicago*, 127 Ill. App. 118.

of most of the states, that an accused is guaranteed the right to have the assistance of counsel at his trial.⁷⁴ This Amendment does not require that he shall have the right of trial by a jury, or that the jury must consist of twelve jurors,⁷⁵ or the right to a new trial,⁷⁶ or the right to appeal.⁷⁷ Neither does it secure him from being compelled to testify against himself.⁷⁸ However, confessions obtained by officers through torture, coercion, brutality, compulsion or other mistreatment are not admissible as evidence,⁷⁹ but an involuntary confession induced by promises of leniency may be used, as may also a sound moving picture of a voluntary confession.⁸⁰ It does not prevent the state from prescribing additional punishment for second or subsequent offenses,⁸¹ but the imposition of a sentence by a court beyond its jurisdiction is void.⁸² By virtue of its sovereignty the state has authority to create and to define new offenses and to provide for their punishment,⁸³ Punishment of a person for an act as a crime when the offender is ignorant of the facts making the act a criminal offense is not a denial of the due process of law.⁸⁴

§ 285. **Due Process in Tax Proceedings.** This subject will be discussed in Chapter 28 in its relation to the power of taxation.

In general, the powers of the states under this clause may be listed as follows: (a) The provisions of the Fifth and Fourteenth Amendments are a guaranty that the essentials of taxation only shall be observed in the taxing of property. All other matters de-

⁷⁴ *Avery v. Alabama*, 308 U. S. 444, 84 L. ed. 377 (see annotation 383-396); *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527; *House v. Mayo*, 324 U. S. 42, 89 L. ed. 739.

⁷⁵ *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597.

⁷⁶ *Ward v. State*, 171 Ind. 565, 86 N. E. 994.

⁷⁷ *Frank v. Mangum*, 237 U. S. 309, 59 L. ed. 969; *United States v. Heinze*, 218 U. S. 532, 54 L. ed. 1139; See also *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867.

⁷⁸ *Turning v. New Jersey*, 211 U. S. 78, 53 L. ed. 97.

⁷⁹ *White v. Texas*, 310 U. S. 530,

84 L. ed. 1342; *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682.

⁸⁰ *State v. Strable*, 228 Iowa 886, 293 N. W. 441; *People v. Hayes*, 21 Cal. App. (2d) 320, 71 P. (2d) 321.

⁸¹ *Graham v. West Virginia*, 224 U. S. 616, 56 L. ed. 917.

⁸² *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501.

⁸³ *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

⁸⁴ *Williams v. North Carolina* 325 U. S. 226, 89 L. ed. 1577, 157 A. L. R. 1366.

pend upon the law-making power of the state and may be varied or changed as the legislative will of the state shall see fit to ordain, provided that any statute enacted shall not be so arbitrary as to compel the conclusion that it was not intended to be a legitimate exercise of the power of taxation, but was actually a confiscation of property;⁸⁵ (b) the legislature has power to classify property for taxation as it may see fit, provided that all persons in the same situation are treated alike and the tax is imposed equally upon all property of the class to which it belongs;⁸⁶ (c) the legislature has the power to provide for a uniform mode of assessment for the purpose of ascertaining the amount of the tax to be paid, but the assessment cannot be arbitrary or oppressive;⁸⁷ (d) the person whose property is subject to taxation must have notice and an opportunity to be heard as to the amount of the charge upon his property. It is sufficient if this opportunity to be heard is given either before the amount of the tax is finally determined or in subsequent proceedings for its collection;⁸⁸ (e) the collection of taxes is an administrative matter,⁸⁹ and the due process clause does not require a judicial proceeding for this purpose. A lien may be impressed against property and it may be forfeited and sold upon publication of notice of sale.⁹⁰

⁸⁵ *Maxwell v. Page*, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 28 L. ed. 569; *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628; *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, 60 L. ed. 493, L. R. A. 1917 D 414, Ann. Cas. 1917 B 713; *Gallup v. Schmidt*, 183 U. S. 300, 46 L. ed. 207; *Cumberland Coal Co. v. Board of Revision Tax Assessments, Greene Co., Pa.*, 284 U. S. 23, 76 L. ed. 146; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78.

⁸⁶ *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628.

⁸⁷ *Missouri, K. & T. R. Co. v. Shannon*, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 631. See Chap. 21, § 275, *supra* (taxation under equal protection clause);

Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. ed. 569.

⁸⁸ *Maxwell v. Page*, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155; *Chesebro v. Los Angeles County Flood Control Dist.*, 306 U. S. 459, 83 L. ed. 921; *Browning v. Hooper*, 269 U. S. 396, 70 L. ed. 330; *Nickey v. Mississippi*, 292 U. S. 393, 78 L. ed. 1323; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 28 L. ed. 569; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Beveridge v. Baer*, 59 S. D. 563, 241 N. W. 727, 84 A. L. R. 189; *Anthony Shoals Power Co. v. Barnett*, 154 Ga. 396, 114 S. E. 362; *Pullman Co. v. Knott*, 235 U. S. 23, 59 L. ed. 105.

⁸⁹ *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. ed. 372.

⁹⁰ *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed.

§ 286. **Due Process in Administrative Proceedings.** The requirement of due process extends to executive and administrative proceedings of the Federal government, as well as to the proceedings before officers, boards and commissions of the state governments to which Congress or the legislature has delegated powers of a judicial or quasi-judicial nature.⁹¹ It prohibits them from depriving any person of his liberty, property or rights in any unjust, arbitrary or confiscatory manner.⁹²

To be due process, the administrative agency, officer, board, commission or other tribunal must be such as is proper to deal with the subject in hand.⁹³ "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimum requirement," asserted Chief Justice Hughes in considering an order of the Public Utility Commission of California. "There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act upon evidence and not arbitrarily."⁹⁴ The legislature may provide that the hearing before the administrative tribunal shall be final,⁹⁵ without providing for an appeal or for an appeal only on question of law.⁹⁶ In the event a right of appeal to the courts exists, the court does not sit as an appellate board of revision, but only to

772; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 75 L. ed. 1289; *Wickwire v. Reinecke*, 275 U. S. 101, 72 L. ed. 184; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701; *Hodge v. Muscatine County*, 196 U. S. 276, 49 L. ed. 477; *Chapman v. Zobelein*, 237 U. S. 135, 59 L. ed. 874; *Costello v. McConnico*, 168 U. S. 674, 42 L. ed. 622.

⁹¹ *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 79 L. ed. 1468; *Virginia Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789; *Ex parte Commonwealth of Virginia*, 100 U. S. 339, 25 L. ed. 676; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979.

⁹² *Railroad Commission of California v. Pacific Gas & Electric Co.*,

302 U. S. 388, 82 L. ed. 319; *Regal Drug Co. v. Wardell*, 260 U. S. 386, 67 L. ed. 318.

⁹³ *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743, L. R. A. 1917 C 944, Ann. Cas. 1916 A 217; *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. ed. 1093; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, Ann. Cas. 1917 D 637.

⁹⁴ *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 82 L. ed. 319.

⁹⁵ *Beck v. Missouri Valley Drainage Dist. (C. C. A.)* 46 F. (2d) 632, 84 A. L. R. 1089.

⁹⁶ *Lloyd Sabuado Societa Anonima v. Elting*, 287 U. S. 329, 77 L. ed. 341; *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 148 N. E. 250, 39 A. L. R. 1057.

enforce constitutional rights.⁹⁷ The practice and procedure of the administrative agencies of the Federal government have been discussed in former chapters, where these rights were fully considered.⁹⁸

The courts have held that a hearing, before a judgment or order is entered by a board, commission, or other administrative tribunal, is not necessary, provided provision is made for a trial *de novo* of the issues before a court,⁹⁹ or the order is subject to judicial review on appeal,¹⁰⁰ or a provision is made for a rehearing upon application,¹⁰¹ and further provision is made for a stay of the proceedings until the final decision is entered.¹⁰² But, where the supersedeas or stay is precluded until the final action of the reviewing court, there is a denial of due process.¹⁰³ Orders without notice and hearing are frequently entered by commissioners of insurance, commissioners and superintendents of banking, public utilities commissioners, and other agencies where immediate action is imperative, or some other reason makes a notice and hearing undesirable. The courts have held that such action is not the exercise of a judicial function, but is administrative in character, or is an exercise of the police power of the state,¹⁰⁴ and that the stockholder or other interested person has a remedy by injunction to enjoin further proceedings.¹⁰⁵

§ 287. Military Law as Due Process. Military law is due process, and the decision of a legally constituted military tribunal acting within the scope of its lawful authority cannot be reviewed

⁹⁷ *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 82 L. ed. 319.

⁹⁸ See Chap. 19, §§ 246, 247, 248, *supra*.

⁹⁹ *Alabama Public Service Commission v. Mobile Gas Co.* 213 Ala. 50, 104 So. 538, 41 A. L. R. 872.

¹⁰⁰ *Lehigh Valley R. Co. v. Public Utility Com'rs*, 278 U. S. 24, 73 L. ed. 161, 62 A. L. R. 805.

¹⁰¹ *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210, 8 A. L. R. 916.

¹⁰² *Porter v. Investors Syndicate*, 286 U. S. 461, 76 L. ed. 1226.

¹⁰³ *Porter v. Investors Syndicate*, 286 U. S. 461, 76 L. ed. 1226.

¹⁰⁴ *American State Bank of Minneapolis v. Jones*, 184 Minn. 498, 239 N. W. 144, 78 A. L. R. 770; *Jeffries v. Bacastows*, 90 Kan. 495, 135 Pac. 582; *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915 E 675; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 15 Ann. Cas. 277.

¹⁰⁵ *American State Bank of Minneapolis v. Jones*, 184 Minn. 498, 239 N. W. 144, 78 A. L. R. 770.

or set aside by the courts.¹⁰⁶ "The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of land and naval forces of the country is as plenary and specific as that given for the organization and conduct of civil affairs," observed Justice Clark. "Military tribunals are as necessary to secure subordination and discipline in the army as courts are to maintain law and order in civil life; and the experience of our government . . . proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs."¹⁰⁷

The powers of these tribunals extend to the trial of enemies who have violated the laws of war. Speaking of the power of a military commander to adopt disciplinary measures in the Yamashita case, Chief Justice Stone declared: "The trial and punishment of enemy combatants who have committed violations of the law of war is not only a part of the conduct of war operating as a preventive measure against such violations but is an exercise of the authority sanctioned by Congress to administer the system of military justice. . . . That sanction is without qualification . . . so long as a state of war exists . . . from its declaration until peace is . . . proclaimed. . . . The war power . . . is not limited to victories in the field but carries with it the inherent power to guard against the renewal of the conflict and to remedy . . . the evils which the conflict has produced."^{107a}

If the court-martial has no jurisdiction over the subject matter of the charge, or shall inflict punishment forbidden by law, civil courts may inquire into the want of jurisdiction and give redress,¹⁰⁸ and the Supreme Court has held that the action of the governor of a state in limiting, by executive order enforced by the military arm of the state, the production of petroleum which would be permitted by him, at a time and place when the courts were open and functioning, was not due process, Chief Justice Hughes asserting, "What are allowable limits of military discretion, and

¹⁰⁶ *Ex parte Richard Quirin*, 317 U. S. 1, 87 L. ed. 3; *Reaves v. Ainsworth*, 219 U. S. 296, 55 L. ed. 225; *United States ex rel. French v. Weeks*, 259 U. S. 326, 66 L. ed. 965; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914; *Kahn v. Anderson*, 255 U. S. 1, 65 L. ed. 469; *Givens v. Zerst*, 255 U. S. 11, 65 L. ed. 475;

Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084.

¹⁰⁷ *United States ex rel. Creary v. Weeks*, 259 U. S. 336, 66 L. ed. 973.

^{107a} *In re Yamashita*, — U. S. —, 90 L. ed. —.

¹⁰⁸ *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838.

whether or not they have been overstepped in a particular case, are judicial questions.”¹⁰⁹ Under a state statute making the military board sought to be reviewed, a judicial tribunal, the appellate division of the Supreme Court of New York held that the decision of the board was reviewable by certiorari, the court saying, “There is a wide difference between the regular Army of the nation and the militia of a state when not in the service of the nation.”¹¹⁰

§ 288. Due Process and the Power to Regulate. Neither the Fifth nor the Fourteenth Amendment prohibits governmental regulation of the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. The guaranty demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected for the regulation shall have a real and substantial relation to the object sought to be attained. The reasonableness of each regulation depends upon the relevant facts.¹¹¹

The regulatory powers of the Federal government are concerned with the commerce, war, money and fiscal powers of this government. Under the power to regulate commerce it regulates navigation, the railroads, motor transportation, the telephone, telegraph and radio, the sale of securities, and air commerce, as well as other businesses and industries.¹¹² Under the money and fiscal powers, it regulates banks, and the national currency,¹¹³ and under the war powers it regulates the liberty and property of the individual for national defense.¹¹⁴ In the exercise of these and other regulations by the Federal government, the individual is secured by the Fifth Amendment from the arbitrary exercise of governmental powers, unrestrained by the established principle of private rights and distributive justice.¹¹⁵

¹⁰⁹ *Sterling v. Constantin*, 287 U. S. 378, 77 L. ed. 375.

¹¹⁰ *Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597.

¹¹¹ *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.

¹¹² See Chap. 18, §§ 224-230, inclusive, *supra*.

¹¹³ See Chap. 17, § 197, *supra*.

¹¹⁴ See Chap. 17, § 204, *supra*.

¹¹⁵ *Columbia Bank v. Okely*, 4 Wheat. 244, 4 L. ed. 559; *Curran v. Wallace*, 306 U. S. 1, 83 L. ed. 441; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. ed. 516, 14 A. L. R. 1045; *North Carolina v. Vanderford*, 35 Fed. 282; *National Labor Relations Board v. Mackay Radio and Tele-*

The regulatory power of the states is exercised through taxation, the power of eminent domain, and the police power. Under these powers they have regulated the manufacture and sale of goods;¹¹⁶ the relationship of employer and employee;¹¹⁷ the pursuit of occupations;¹¹⁸ railroads, street railways and busses;¹¹⁹ motor vehicles and the use of the highways;¹²⁰ banks and banking;¹²¹ insurance companies;¹²² and gas and electric companies.¹²³ They have controlled municipal corporations,¹²⁴ enacted zoning laws,¹²⁵ health laws,¹²⁶ and generally adopted such regulations as would provide for the public health, public morals, public safety and the public welfare. Speaking of legislative measures enacted to aid in the battle against the depression, Justice Roberts observed: "But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells so far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a

graph Co., 304 U. S. 333, 82 L. ed. 1381; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672.

¹¹⁶ *Biddle Purchasing Co. v. Federal Trade Commission* (C. C. A.) 96 F. (2d) 687.

¹¹⁷ *Price v. Illinois*, 238 U. S. 446, 59 L. ed. 1400; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689.

¹¹⁸ *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 409, 43 L. ed. 746; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628.

¹¹⁹ *Reetz v. Michigan*, 188 U. S. 506, 47 L. ed. 563; *Hope Natural Gas Co. v. Hall*, 102 W. Va. 272, 135 S. E. 582.

¹²⁰ *Alton R. Co. v. Illinois Commerce Commission*, 305 U. S. 548, 83 L. ed. 344; *Chicago v. New York, C. & St. L. R. Co.* (C. C. A.) 216 Fed. 735; *Georgia Power Co. v. City of Decatur*, 281 U. S. 505, 74 L. ed. 999.

¹²¹ *Stanley v. Public Utilities Commission*, 295 U. S. 76, 79 L. ed. 1311.

¹²² *Manley v. State of Georgia*, 279 U. S. 1, 73 L. ed. 575; *Love v. Mangum*, 160 Miss. 590, 135 So. 223.

¹²³ *Home Indemnity Co. of New York v. O'Brien* (C. C. A.) 104 F. (2d) 413; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084.

¹²⁴ *Natural Gas Pipeline Co. of America v. Slaterry*, 302 U. S. 300, 82 L. ed. 276; *Southern Bell Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 187 La. 137, 174 So. 180.

¹²⁵ *Poor Dist. of City of WilliamSPORT v. Lycoming County*, 309 Pa. 405, 164 Atl. 339; *Edwards v. Bilb County Board of Com'rs*, 193 Ala. 554, 69 So. 449.

¹²⁶ *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210; *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. (2d) 587, 117 A. L. R. 1110.

state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare." ¹²⁷

This power includes the regulation of rates, wages and prices and the proportionate distribution of crop and oil production.¹²⁸ To meet the requisites of the due process clause, the rates, prices and wages, or other order cannot be confiscatory, which requires a determination of the value of the property concerned, and the proper rate of return upon such value.¹²⁹ The regulation of these items cannot result in the taking of the private property of one person and transferring it to another contrary to the settled usages and modes of procedure, and without just compensation.¹³⁰ Whether rates are confiscatory or are a denial of due process of law is a question for judicial determination.¹³¹

¹²⁷ *People v. Anderson*, 355 Ill. 289, 189 N. E. 338; *Ex parte Lewis*, 328 Mo. 843, 42 S. W. (2d) 21; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305; *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940; *Helmer v. Abess*, 134 Fla. 610, 184 So. 122.

¹²⁸ *Wickard v. Filburn*, 317 U. S. 111, 87 L. ed. 122; *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 84 L. ed. 1368 and 311 U. S. 570, 85 L. ed. 358.

¹²⁹ *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18; *Smyth*

v. Ames, 169 U. S. 466, 42 L. ed. 819; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 82 L. ed. 319. But see *Driscoll v. Edison Light & Power Co.*, 307 U. S. 104, 83 L. ed. 1134.

¹³⁰ *Albritton v. Winona*, 181 Miss. 75, 178 So. 799, 115 A. L. R. 1436; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 57 L. ed. 1427.

¹³¹ *Carter v. Carter Coal Co.* 298 U. S. 238, 80 L. ed. 1160; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970; *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 78 L. ed. 160; *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 57 L. ed. 1610.

CHAPTER 23

POLITICAL AND PUBLIC RIGHTS

A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.

—Justice Douglas

§ 289. **Definition.** Political or public rights consist of the privileges of participating directly, and indirectly, in the establishment and management of the government. Every native born or naturalized citizen enjoys the rights and privileges of citizenship such as the right of suffrage, the right of free speech and the right of assembly and of petition, as well as kindred rights of a political or public nature.¹

§ 290. **Citizenship, Naturalization, Right of Expatriation.** Citizenship and naturalization have been defined and discussed in former chapters.²

Expatriation is the act of renouncing the rights and liabilities of citizenship of the country of which one is a native or naturalized citizen and becoming a citizen of another country. It is a natural and inherent right of all people and is indispensable to the enjoyment of life, liberty and the pursuit of happiness, and Congress has declared that any instruction, order or decision of any officer of the United States, which denies, impairs or questions this right is inconsistent with the fundamental principles of the republic.³

Expatriation results in the loss of nationality. The Nationality Act of 1940 provides that a citizen of the United States, whether by birth or naturalization, shall lose his citizenship (a) by obtaining

¹ 2 Bouvier Law Dict. (3d Rev.) 2961-2962.

² See Chap. 9, § 87 (citizenship) and Chap. 17, § 198 (naturalization).

³ 8 USC 800; United States v. Husband, (C. C. A.) 6 F. (2d) 957.

naturalization in a foreign country; (b) by making formal declaration of allegiance to a foreign state; (c) by serving in the armed forces of a foreign state, unless specially authorized by the laws of the United States; (d) by accepting or performing the duties of an office of a foreign state to which only nationals of such state are eligible; (e) by voting in a political election in a foreign state or voting or participating in a plebiscite to determine the sovereignty over foreign territory; (f) making formal renunciation of nationality; (g) upon conviction by court martial of desertion of the military or naval forces of the United States in time of war, unless the deserter shall later be restored to active duty with the permission of competent military or naval authority; (h) upon conviction by court martial or court of competent jurisdiction of treason, or attempting to overthrow, or bearing arms, against the United States.⁴ Protracted absence from the United States, coupled with acts indicative of intent to assume foreign citizenship, will also result in expatriation.⁵

One who has been expatriated can be repatriated only through the process of naturalization,⁶ except that a citizen entering the military service of a foreign nation during World Wars I and II may resume his United States citizenship by taking an oath of allegiance.⁷ Since a child born in the United States becomes a citizen of the United States, he, although born of naturalized parents, does not lose his citizenship by being taken by his parents during minority to the country of their origin, where they resume their former allegiance, provided that on attaining majority the child elects to retain his citizenship and return to the United States. The principle of expatriation presupposes a voluntary abandonment of citizenship, which cannot be imputed to an infant during minority.⁸ Involuntary military service in a foreign country does not expatriate either a native or naturalized citizen.⁹ Expatriation is a matter of intent on the part of the person concerned, which may be shown by some express act, or some other act from which the real intention of the citizen may be gathered.¹⁰

⁴ Nationality Act of 1940, Chap. 4, § 401, 8 USC 801 (g).

⁵ *Rojok v. Marshall*, 34 F. (2d) 219.

⁶ *Petition of Proek*, 60 F. (2d) 171. See *Reynolds v. Haskins*, 8 F. (2d) 473, 45 A. L. R. 759.

⁷ 8 USC 723. See *Camardo v.*

Tillinghast (C. C. A.) 29 F. (2d) 527.

⁸ *Perkins v. Elg*, 307 U. S. 325, 83 L. ed. 1320.

⁹ *United States ex rel Fracassi, v. Karnuth*, 19 F. Supp. 581.

¹⁰ *Perkins v. Elg*, 69 App. D. C. 175, 99 F. (2d) 408.

§ 291. **Right of Suffrage.** Suffrage is participation in the government, and in a representative government it is the taking part in the choice of officers or in the decision of public questions.¹¹ It is a franchise dependent upon law by which it must be conferred to permit its exercise.¹² The right to vote is granted by the Constitutions of the several states¹³ but the legislatures generally define the qualifications of the voters and the manner of conducting the elections. They regulate the registration of voters, methods of voting and define the machinery of the several political parties.¹⁴ They may determine, subject to the Fifteenth and Nineteenth Amendments, what persons shall be admitted to or excluded from exercising the right of suffrage¹⁵ and they may withhold the privilege of voting from a naturalized person for a stated period of time.¹⁶ They may require the payment of a poll tax before voting.¹⁷ They generally exclude incompetent persons.¹⁸ Many of them provide that the conviction of an infamous crime will deprive the offender of the right to vote¹⁹ but an arbitrary classification of voters cannot be made and it is doubtful whether any substantial discrimination may be made between electors with full suffrage.²⁰ Where the Constitution of the state fixes the qualifications of those who enjoy the right to vote, the legislature cannot

¹¹ *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487.

¹² *DuPont v. Mills*, 9 W. W. Harr. (39 Del.) 42, 196 Atl. 168, 119 A. L. R. 174; *Davis v. Teague*, 220 Ala. 309, 125 So. 51.

¹³ *Chamberlain v. Wood*, 15 S. D. 216, 88 N. W. 109, 56 L. R. A. 187. For example, see Constitution of Missouri, Art. II, § 9; Constitution of Montana, Art. III, § 5, Constitution of Nebraska, Art. I, § 22.

¹⁴ *Chamberlain v. Wood*, 15 S. D. 216, 88 N. W. 109, 56 L. R. A. 187, 91 Am. St. Rep. 674. See Constitution of Washington, Art. VI, also Amendments 2 and 5. For other states, see Thorpe, American Charters, Constitutions and Organic Laws; *Pope v. Williams*, 98 Md. 59, 56 Atl. 543, 66 L. R. A. 398, 103 Am. St. Rep. 379.

¹⁵ *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 306, L. R. A. 1915 B 247, Ann. Cas. 1915 A 772.

¹⁶ *Pope v. Williams*, 98 Md. 59, 56 Atl. 543, 66 L. R. A. 398, 103 Am. St. Rep. 379.

¹⁷ *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487.

¹⁸ *Stone v. Smith*, 159 Mass. 413, 34 N. E. 521.

¹⁹ *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637; *Gotehens v. Matheson*, 58 Barb. (N. Y.) 152. See also *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47.

²⁰ *Coggeshall v. City of Des Moines*, 138 Iowa 730, 117 N. W. 309, 128 Am. St. Rep. 221; *Guim v. United States*, 238 U. S. 347, 59 L. ed. 1340, L. R. A. 1916 A 1124; *Myers v. Anderson*, 238 U. S. 368, 59 L. ed. 1349.

alter, modify or dispense with the qualifications set forth in the Constitution and it cannot add new or different qualifications.²¹

The Constitution of the United States does not confer the right to vote but it has placed limitations upon the states by the Fourteenth, Fifteenth and Nineteenth Amendments.²² The Fifteenth Amendment provides that the right to vote for members of Congress and for presidential electors is fundamentally based upon the Constitution of the United States and was not intended to be left within the exclusive control of the states. Congress can, therefore, protect the act of voting for members of Congress, the place where it is done and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud. Such powers are not annulled because an election for state officers is held at the same time and place.²³

§ 292. Freedom of Suffrage Protected. Every citizen not only enjoys the right of suffrage, provided that he is qualified, but also freedom of suffrage is likewise protected. It is a cardinal principle that every citizen should have the unquestioned right to vote for whom he pleases. To protect this principle, statutes have been enacted by many states and by the Federal government. Secrecy in voting, whether by ballot or voting machines, is universal.²⁴ Electioneering at the polls is prohibited. A majority of the States has adopted statutes similar to that of the State of Washington, which provides that "no officer of election shall do any electioneering on election day. No person shall do any electioneering on election day within a polling place, or any building in which an election is being held, or within fifty feet thereof, nor obstruct the doors or entries thereto, or prevent free ingress to or egress from said building."²⁵

²¹ *Coggeshall v. City of Des Moines*, 138 Iowa 730, 117 N. W. 309, 128 Am. St. Rep. 221. See Constitution of Iowa, Art. II and Amendment of Nov. 3, 1868 (right of suffrage).

²² *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *State v. Weber*, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869.

²³ *Ex parte Yarbrough*, 110 U.

S. 651, 28 L. ed. 274; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97.

²⁴ *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 163 N. E. 131, 66 A. L. R. 54; *United States v. Classic*, 313 U. S. 299, 85 L. ed. 1368.

²⁵ 6 Rem. Rev. Stats. of Washington, § 5298; *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346.

In 1939 Congress adopted an act, popularly known as the Hatch Act, prohibiting pernicious political activities in national elections. (a) It provided that it was unlawful for any person to intimidate, threaten, coerce or otherwise interfere with any other person in his right to vote for any candidate for the office of President, Vice-President or member of Congress at any election for the choosing of such officer and made the violation of the act punishable by fine and imprisonment. (b) It prohibited officers and other persons employed in an administrative position of the Federal government from using their official authority for, in any way, affecting the nomination or election of such officers. (c) It prohibited the solicitation or collection of assessments or contributions for such political purposes from any person in such employment. (d) It forbade the use of any appropriations made for relief to be used for influencing or coercing any individual in the right to vote. (e) It prohibited the officers and employees of the Federal government from taking any active part in political management or in any political campaigns. But such officers and employees retain the right to vote as they please and express their opinions on all political subjects. All such officers and employees are prohibited from having membership in any political party or other organization advocating the overthrow of the constitutional form of government of the United States.²⁶

§ 293. Disfranchisement. Disfranchisement is used here in its more popular sense of the taking away of the elective franchise from any citizen or class of citizens. It may be defined as the act of depriving a person or a class of persons of the franchises, rights, and privileges formerly held by him or them, including the right to vote and to hold office. Voters may be said to be disfranchised where they, being entitled to vote, are denied the right to do so and also where they have been permitted to vote but their votes, by reason of fraud, violence or other wrongdoing, have not been counted at all or have not been counted as cast.²⁷

The power of the state to deprive a person of his elective franchise may be illustrated by the following examples: (a) A person convicted of an infamous crime may be denied the right to vote or

²⁶ 18 USC 61-61k.

²⁷ Scholl v. Bell, 125 Ky. 750, 102 S. W. 248.

to hold office²⁸ but, unless otherwise provided by the organic law, restoration to full citizenship restores the political rights of the convicted person.²⁹ (b) Minors, insane and illiterate persons may be denied the right to vote or to hold office³⁰ but illiteracy is not a disqualification unless made so by the state Constitution or by a statutory enactment.³¹ (c) Where the right to vote depends upon citizenship, the renunciation or forfeiture of that citizenship will disqualify an elector.³² (d) No religious test can be made a qualification of an elector in order for him to exercise his right of suffrage.³³ (e) Persons in the employ of the United States do not acquire a residence for the purpose of voting in the districts in which they are located or lose their right to vote in the places from which they came.³⁴

§ 294. Freedom of Speech and of the Press. The freedom of speech and of the press guaranteed by the Constitution embraces the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. These rights were not granted by the Constitution but were recognized and guaranteed by it. They had their origin in the processes of English jurisprudence and in the exigencies of the colonial period. The efforts to secure freedom from oppressive administration in those days developed a broadened conception of these liberties.³⁵ The right was considered so vital that it was especially preserved in the First Amendment. "The language of this Amendment imports no more," wrote Justice Story, "than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever without any prior restraint, so long as he does not injure any other person in his rights, person, property or reputation; and so always that he does not thereby disturb the public peace or attempt to subvert the government." The

²⁸ *Baum v. State*, 157 Ind. 282, 61 N. E. 672, 55 L. R. A. 250.

²⁹ *Knott v. United States*, 95 U. S. 149, 24 L. ed. 442.

³⁰ *State v. Joyce*, 123 La. 637, 49 So. 221, 17 Ann. Cas. 905; *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397.

³¹ *Pearson v. Brunswick*, 91 Va. 322, 21 S. E. 485.

³² *Severance v. Healey*, 50 N. H. 448.

³³ *State v. Findlay*, 20 Nev. 193, 19 Pac. 241, 19 Am. St. Rep. 346.

³⁴ *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

³⁵ *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 1093; 2 Story, Constitution, §§ 1882-1892.

right is accorded to all citizens, naturalized as well as native born. It is accorded also to aliens.³⁶

This Amendment does not preclude the states from abridging freedom of speech or of the press³⁷ but such prohibition was effected by the due process clause of the Fourteenth Amendment.³⁸ Asserting that this guaranty was essential to the existence of the nation, Justice Murphy in a late case remarked: "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government,"³⁹ and this guaranty has increased in importance through the advent and the development of the radio.⁴⁰

The liberty of the press and the freedom of speech are of the same fundamental character.⁴¹ The liberty of the press is no greater than the freedom of speech enjoyed by individuals. It is intended simply to secure to the conductors of the press the same rights and immunities and such only as are enjoyed by the public at large.⁴² It consists of the right to publish with impunity the truth, with good motives and for justifiable ends, whether it respects governments or individuals,⁴³ and to print what it chooses,

³⁶ 2 Story, Constitution, § 1881; Baumgartner v. United States, 322 U. S. 665, 88 L. ed. 1525; Bridges v. Wixon, 326 U. S. 135, 89 L. ed. 2103.

³⁷ State v. Hoffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917 E 229, L. R. A. 1917 C 610; Permolli v. New Orleans, 3 How. 609, 11 L. ed. 739.

³⁸ Grosjean v. American Press Co., 297 U. S. 233, 80 L. ed. 660; Hague v. Committee for Industrial

Organization, 307 U. S. 496, 83 L. ed. 1423.

³⁹ Thornhill v. Alabama, 310 U. S. 88, 84 L. ed. 1093.

⁴⁰ See 47 USC Chap. 5.

⁴¹ Grosjean v. American Press, 297 U. S. 233, 80 L. ed. 660.

⁴² Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Layne v. Tribune Co., 108 Fla. 177, 146 So. 234, 86 A. L. R. 466.

⁴³ State v. Shepard, 177 Mo. 405, 76 S. W. 79, 99 Am. St. Rep. 624.

without previous license, but subject to be held responsible therefor, as any one else for a similar publication.⁴⁴

The radio, the newspapers, the magazines and other journals of the country are so vital to the nation in the dissemination of news that the suppression or abridgment of them is a matter of grave concern. It goes to the heart of the natural right of the people of the nation to impart and acquire information about their common interests and for their common good.⁴⁵ A state may not, therefore, enact a statute declaring a newspaper to be a public nuisance and prohibit its publication,⁴⁶ and the Supreme Court has held a state statute imposing a license tax, based on gross receipts, for the privilege of engaging in the business of publishing advertising in any newspaper or other journal or periodical and intended to penalize certain publishers and to curtail certain publications was unconstitutional.⁴⁷ Such statutes amount to an infringement of the liberty of the press.⁴⁸ But a state may enact a statute imposing an annual privilege tax upon various kinds of business, including newspapers, which shows no design to restrain the press.⁴⁹

Freedom of speech and of the press exist as to political activity and propaganda. The fitness and qualification of a candidate for elective office may be the subject of the freest scrutiny and investigation, either by the proprietor of a newspaper or by a voter or other person having an interest in the matter. But this right does not permit the newspapers to publish with impunity charges for which others would be responsible. The publisher of a newspaper possesses no immunity not belonging to any other citizen. For example, newspaper publication untruthfully imputing to a candidate for office the commission of a crime was held liable for libel.⁵⁰ But the publication of a radio address making charges and an at-

⁴⁴ *Levert v. Daily States Pub. Co.*, 123 La. 594, 49 So. 206, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356.

⁴⁵ *Grosjean v. American Press*, 297 U. S. 233, 80 L. ed. 660.

⁴⁶ *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357; *Ex parte Neill*, 32 Tex. Cr. R. 275, 22 S. W. 923, 40 Am. St. Rep. 776.

⁴⁷ *Grosjean v. American Press Co.*, 297 U. S. 233, 80 L. ed. 660.

⁴⁸ *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357.

⁴⁹ *Giragi v. Moore*, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A. L. R. 314.

⁵⁰ *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622.

tack upon a candidate in violation of a statute was permitted as news.⁵¹

Liberty of speech and of the press extends to the publication of judicial proceedings. Newspapers and citizens alike have the right to bring to public notice the conduct of the courts, provided that the publications, by press or speech, are true in spirit and the language constitutes fair and honorable criticism and does not go to the extent of assigning to any party or to the court false or dishonest motives. There is no law to restrain or punish the freest expression of disapprobation that any person may entertain of what is done in or by the courts.

This right, however, is subordinate to the independence of the judiciary and the law will not permit any person or class to embarrass the administration of justice. Liberty of the press cannot be confounded with license or the abuse of liberty. For example, a newspaper publication reflecting on the integrity of the Supreme Court of Florida was held by the court to constitute contempt⁵² and the publication of an *ex parte* affidavit falsely charging an individual with crime and used in a preliminary proceeding was held libelous.⁵³ Likewise, indiscriminate newspaper charges of perjury, bribery, corruption, and the like against the parties concerned, or against those conducting the trial, was held not to be a constitutional right but to be subject to punishment for contempt.⁵⁴ But the possibility of engendering disrespect for the judiciary through the publication of criticism of a judge, while not in good taste, is not sufficient to cause a curtailment of the right of freedom of speech or of the press. Before such an utterance can be punished, there must be a clear and present danger of substantive evil and the degree of imminence must be extremely high.⁵⁵

The liberty of the press is not confined to newspapers and periodicals. It includes the printing, publishing and circulation of pamphlets, leaflets and every sort of publication which afford a vehicle of information and opinion. The Supreme Court, there-

⁵¹ *Ex parte Hawthorne*, 116 Fla. 608, 156 So. 619, 96 A. L. R. 972.

⁵² *Re Hayes*, 72 Fla. 558, 73 So. 362, L. R. A. 1917 D 192, Ann. Cas. 1918 B 936.

⁵³ *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 78 Am. Dec. 285.

⁵⁴ *Cooper v. People*, 13 Colo. 373, 6 L. R. A. 430, 442.

⁵⁵ *Bridges v. California*, 314 U. S. 252, 86 L. ed. 192, 159 A. L. R. 1346.

fore, held a municipal ordinance void because it prohibited the distribution of circulars, handbooks, advertising or literature of any kind without a permit.⁵⁶

A statute penalizing the display of a flag or other emblem of opposition to organized government was held invalid as a denial of the opportunity for free political discussion.⁵⁷ But a state statute requiring parades and processions of persons carrying banners and placards advertising their religious beliefs to secure a license from the local authorities was held not to be an unconstitutional abridgment of the freedom of speech and of the freedom of the press.⁵⁸

§ 295. Limitations Upon Freedom of Speech and of the Press. Liberty of speech and of the press is subject to restriction and limitation⁵⁹ but it may not be restricted except to prevent grave and immediate danger to interests the state may lawfully protect.⁶⁰

The provisions of the First and Fourteenth Amendments were not intended to extend immunity to every use and abuse of language.⁶¹ "It is a fundamental principle, long established," observed Justice Sandford, "that the freedom of speech and of the press . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents punishment for those who abuse this freedom."⁶² The state may, in the exercise of its police

⁵⁶ *Martin v. Struthers*, 319 U. S. 141, 87 L. ed. 1313; *Lovell v. Griffin*, 303 U. S. 444, 82 L. ed. 949; *Valentine v. Chrestensen*, 316 U. S. 52, 86 L. ed. 1262 (distribution of circular having political matter on one side and advertising matter on the other held violation of ordinance against distribution of advertising matter on streets). See also *Jamison v. Texas*, 318 U. S. 413, 87 L. ed. 869 and *Schneider v. State (Town of Irvington)* 308 U. S. 147, 84 L. ed. 155.

⁵⁷ *Stromberg v. California*, 288 U. S. 359, 75 L. ed. 1117, 73 A. L. R. 1484.

⁵⁸ *Cox v. New Hampshire*, 312 U.

S. 569, 85 L. ed. 1049, 133 A. L. R. 1396.

⁵⁹ *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357.

⁶⁰ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 87 L. ed. 1628, 147 A. L. R. 674; *Thomas v. Collins*, 323 U. S. 516, 89 L. ed. 430; *Associated Press v. United States*, 326 U. S. 1, 89 L. ed. 2013.

⁶¹ *Tipton v. Sands*, 103 Mont. 1, 60 P. (2d) 662, 106 A. L. R. 474; *Gilbert v. Minnesota*, 254 U. S. 325, 65 L. ed. 287.

⁶² *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138.

power, punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace. For example, a state may punish publications advocating and encouraging a breach of its criminal laws; or advocating the overthrow of our constitutional government by violence or other unlawful means;⁶³ or it may punish the use of lewd, obscene, profane, libelous and other words which by their very utterance inflict injury.⁶⁴ There is no constitutional immunity for such conduct which is abhorrent to our institutions.⁶⁵

In the time of war the restrictions upon this freedom are much greater. During World War I a limited censorship of news existed and Congress enacted the Espionage Act which provided that "Whoever, when the United States is at war, shall wilfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely or disrepute shall be punished by a fine of not more than \$10,000 or imprisonment of not more than twenty years or both."⁶⁶ The Supreme Court held this act valid, Justice Holmes asserting that "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."⁶⁷ This statute was also in force during World War II. In the time of war or threat of war or state of public peril or other national emergency the President, upon issuing a proclamation, may seize, suspend and close any or all radio stations and thus limit the dissemination of news.⁶⁸

⁶³ *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138; *Stromberg v. California*, 283 U. S. 359, 75 L. ed. 1117, 73 A. L. R. 1484.

⁶⁴ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. ed. 1031.

⁶⁵ *Stromberg v. California*, 283 U. S. 359, 75 L. ed. 1117, 73 A. L. R. 1484.

⁶⁶ 50 USC 33. For the liberal construction of this act during World War II, see *Hartzell v. United States*, 322 U. S. 680, 88 L. ed. 1534.

⁶⁷ *Schenck v. United States*, 249 U. S. 47, 63 L. ed. 470.

⁶⁸ 47 USC 606.

The guaranty applies to municipal ordinances as well as acts of the legislature and the Supreme Court held void an ordinance prohibiting the distribution, without permit, of circulars, handbooks advertising and other literature⁶⁹ or canvassing for orders of goods, wares, and merchandise including books.⁷⁰ A city may restrict the sale of magazines in certain defined districts but it may not tax or prohibit the distribution of religious books and pamphlets by colporteurs.⁷¹ It also applies to postal regulations. The postoffice department may exclude from the mails lottery tickets⁷² and other literature deemed injurious to public morals⁷³ or advocating treason, insurrection or forcible resistance to the laws of the United States.⁷⁴ An act of Congress may bar an obscene book from transportation by express⁷⁵ and the courts have held that the refusal of the Federal Radio Commission to renew the broadcasting license to one who abused it by broadcasting defamatory and untrue matter was not a denial of freedom of speech.⁷⁶

§ 296. Freedom of Censorship by the Courts. The right of the citizen to speak, write, and publish his sentiments is not subject to censorship by the courts and they cannot by injunction or otherwise restrain the citizen in the exercise of this liberty.⁷⁷ "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint," asserted Justice Murphy in holding unconstitutional a picketing law making it an offense to loiter near a place of business

⁶⁹ Lovell v. Griffin, 303 U. S. 444, 82 L. ed. 949; South Holland v. Stein, 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957.

⁷⁰ South Holland v. Stein, 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957.

⁷¹ Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A. L. R. 1045; Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1292, 146 A. L. R. 81; Martin v. Struthers, 319 U. S. 141, 87 L. ed. 1313.

⁷² Swartz v. Edrington, 133 La. 235, 62 So. 660, Ann. Cas. 1915 B 1180.

⁷³ Horner v. United States, 143

U. S. 207, 36 L. ed. 126; Harman v. United States, 50 Fed. 921.

⁷⁴ Masses Pub. Co. v. Patton (C. C. A.) 246 Fed. 24, L. R. A. 1918 C 79, Ann. Cas. 1918 B 999.

⁷⁵ Swartz v. Edrington, 133 La. 235, 62 So. 660, Ann. Cas. 1915 B 1180.

⁷⁶ Trinity Methodist Church South v. Federal Radio Commission, 61 App. D. C. 311, 62 F. (2d) 850.

⁷⁷ Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357; Daily v. Superior Court, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160.

with the purpose of informing customers and the public of the facts in dispute.⁷⁸ The Constitutional guaranty furnishes no protection against an action based on a wrongful or criminal act. A court has no authority to prohibit threatened statements or to restrain by injunction the publication of a libel⁷⁹ and an injunction against a theater prohibiting it from producing a play based upon a pending court case was held illegal. The authority to enjoin persons from exercising freedom of speech in peaceably assisting in a boycott or a strike has been denied, the court saying "Wherever the authority of injunctions begins, there the right of free speech, free writing or free publication ends", and continuing, the citizen "shall have no censor over him to whom he must apply for permission to speak, write or publish but he shall be held accountable to the law for what he speaks, what he writes and what he publishes. It is patent that this right . . . cannot be abused until it is exercised and before it is exercised there is no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship and for the courts to act as censors is directly violative of that purpose."⁸⁰ Likewise, a statute providing for abatement, as a public nuisance, of the business of publishing or giving away malicious, scandalous, defamatory newspaper, magazine or other periodical by the process of injunction, prohibiting further publication, was held by the Supreme Court to violate the constitutional guaranty of freedom of the press.⁸¹

§ 297. Criticism of the Government. Freedom of speech and of the press includes the right of criticism of public men, public measures and the plans and policies of the government. It includes the right to advocate a change in the government by peaceful means, to expose incompetency and corruption on the part of persons charged with the administration of governmental affairs and the right to place before readers of the press and auditors of the radio current happenings of the time.⁸² But this privilege

⁷⁸ *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 1093.

⁷⁹ *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 500, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476.

⁸⁰ *Marks & Haas Jeans Clothing*

Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440.

⁸¹ *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357.

⁸² *Barton v. City of Bessemer*, 234 Ala. 20, 173 So. 626.

cannot be abused by utterances inimical to the public welfare or endangering the foundations of organized society or threatening its overthrow by unlawful means. In short this freedom does not deprive the Federal and state governments of the right of self-preservation.⁸³ Speaking of this right, Justice Story more than a century ago observed: "No one can doubt the importance, in a free government, of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers and to scrutinize closely the policy and plans of government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free but not licentious discussion must be encouraged. But the exercise of a right is essentially different from an abuse of it. The one is no legitimate inference from the other. Common sense here promulgates the broad doctrine *sic utere tuo, ut non alienum laedas*; so exercise your own freedom as not to infringe the rights of others or of the public peace and safety."⁸⁴

Statutes prohibiting the expression, either by speech, press or radio, of sentiments advocating the commission of a crime or criminal syndicalism, inciting the overthrow of the government, or urging disrespect or disobedience for law have been held not unconstitutionally to abridge the liberty of speech and of the press.⁸⁵

§ 298. Parliamentary Privilege. This privilege relates to utterances and publications by members of Congress and other legislative bodies in the discharge of their public duties. The Constitution provides "and for any speech or debate in either house they (senators and representatives) shall not be questioned in any other place."⁸⁶ And many states have adopted provisions similar to the Twenty-first Article of the Declaration of Rights of Massachusetts. This article declares that "the Freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint in any

⁸³ *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138.

⁸⁴ Story, *Constitution*, § 1888.

⁸⁵ *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138; *State v. Fox*, 71 Wash. 185, 127 Pac. 1111; *Fox*

v. Washington, 236 U. S. 273, 59 L. ed. 573; *State v. Denny*, 152 Ore. 541, 53 P. (2d) 713. But see *Taylor v. Mississippi*, 319 U. S. 583, 87 L. ed. 1600.

⁸⁶ Const. Art. I, § 6, cl. 1.

other court or place whatsoever." This privilege belongs to each individual member of Congress or of the legislature and not to these bodies as governmental organizations.⁸⁷

This subject has been discussed at length in section 186.

§ 299. Right to Assembly and Petition the Government. The right of assembly and to petition the government has a close affinity to those of free speech and free press and is equally basic.⁸⁸ The right was a development of English law from the time of Edward VI (1549), when it was declared to be treason for any twelve persons to meet together on any matter of state, and of the Bill of Rights (1688), declaring "that it is the right of the subject to petition the King, and commitments and prosecutions for such petitioning are illegal."⁸⁹ The right was preserved in the First Amendment which provided that "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This provision was a limitation upon the National government only,⁹⁰ but the Fourteenth Amendment placed the same prohibition upon the states.⁹¹

These Amendments guaranteed the right against abridgment by Congress and by the states.⁹² "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National government," observed Chief Justice Waite, "is an attribute of national citizenship, and, as such under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on a part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of griev-

⁸⁷ Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

⁸⁸ De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278; State v. Diamond, 27 N. M. 477, 202 Pac. 988, 20 A. L. R. 1527.

⁸⁹ Taswell-Langmead English Constitutional History (8th Ed.) 368-369, 626.

⁹⁰ United States v. Cruikshank, 92 U. S. 552, 23 L. ed. 588.

⁹¹ Hague v. Committee for Industrial Organization, 307 U. S. 496, 83 L. ed. 1423; DeJonge v. Oregon, 299 U. S. 353, 81 L. ed. 278. See also People v. Gidaly, 35 Cal. App. (2d) 758, 93 P. (2d) 660; Reno v. Second Judicial District Court in and for Washoe County, 59 Nev. 416, 95 P. (2d) 994, 125 A. L. R. 948.

⁹² Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A. L. R. 1364.

ances.”⁹³ Neither the Federal or state governments, therefore, nor Federal or state officials—whether executive, legislative or judicial—may assume the power to deny or curtail the right of the people to assemble or the right to petition the government relative to matters connected with its powers and its duties.⁹⁴

But the right to assemble and to petition the government, or the right of assembly or the right to petition is not unlimited.⁹⁵ These rights may be abused. They may be used to incite to violence and crime, and the people, through their legislatures, are empowered to protect themselves against such abuse. But peaceable assembly for lawful discussion cannot be made a crime, even though the assembly is held under the auspices of an organization which advocates the employment of unlawful means to effect industrial or political changes.⁹⁶ They are subject to such reasonable regulation as the government shall make to protect the general welfare.⁹⁷ They cannot be exercised at times and places and in circumstances in conflict with the enjoyment of other well-recognized rights of individuals and of the public. For example, the making of a speech from a box on a highway used by vehicles, thereby causing a crowd to gather and to obstruct the highway, was not an assembly protected by the guaranty.⁹⁸

The assembly must be used for a lawful purpose, and must not be tumultuous or riotous in character and the petitions must not be of a seditious nature or accompanied by intimidation or threats.⁹⁹ The right of petition does not include the right of an attorney or any other person to approach a court by a public petition not conforming to the ordinary course of judicial procedure, to make a specific disposition of a case pending before it, or in any way to attempt to influence the decision of a court. Such a procedure will constitute contempt of court.¹⁰⁰ The right of assembly

⁹³ United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

⁹⁴ Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A. L. R. 1364.

⁹⁵ Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194.

⁹⁶ DeJonge v. Oregon, 299 U. S. 353, 81 L. ed. 278.

⁹⁷ Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194.

⁹⁸ Commonwealth v. Surridge, 265 Mass. 425, 104 N. E. 480, 62 A. L. R. 402.

⁹⁹ Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A. L. R. 1364; State v. Simchuk, 96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515.

¹⁰⁰ Re Stolen, 193 Wis. 602, 214 N. W. 379, 55 A. L. R. 1355.

includes a political convention and the Supreme Court of Nebraska held invalid an enactment providing that candidates for judicial and educational offices shall not be nominated, indorsed, recommended, censured, criticized or referred to by any political party or any political convention or primary.¹⁰¹ This right, however, does not prevent the enactment of uniform primary election laws.¹⁰²

¹⁰¹ State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839.

¹⁰² State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

CHAPTER 24

CONSTITUTIONAL GUARANTIES IN CRIMINAL CASES

The aim of these constitutional safeguards is a full, fair and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of the accused parties.

—Justice Sutherland

§ 300. Constitutional Provisions. Under the Federal Constitution and the several state constitutions every person charged with a crime is secured with certain constitutional guaranties in the trial, in the judgment to be entered, and in the punishment to be inflicted, which are deemed to be essential for the protection of the people of the United States in the due administration of justice. The guaranties of the Federal government are contained in the Constitution and in the Fifth, Sixth, Eighth and Fourteenth Amendments, which contain the following provisions:

“No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in a criminal case to be a witness against himself.”¹

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”²

“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed

¹ Amendment V.

² Amendment VI.

within any state, the trial shall be at such place or places as the Congress may by law have directed."³

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴

"No Bill of Attainder or ex post facto law shall be passed."⁵

"The privilege of the Writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."⁶

"Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"The Congress shall have the power to declare the punishment of treason, but no attainder of treason shall work a corruption of blood, or forfeiture except during the life of the person attainted."⁷

Except for bills of attainder and ex post facto laws, these provisions were intended to apply exclusively to the powers exercised by the Federal government, whether by Congress or the judiciary.⁸ They were not intended to be a limitation upon the power of any state in its dealings with persons offending against its own laws.⁹ Many of the states, however, have included similar provisions in their constitutions.¹⁰ But the states were prohibited by the Constitution from passing any Bill of Attainder or ex post facto law,¹¹ or depriving any person of his life, liberty or property without due process of law, or denying any person within its jurisdiction the equal protection of the laws.¹² In so far as these rights are

³ Const. Art. III, § 2, cl. 3.

⁴ Amendment VIII.

⁵ Const. Art. I, § 9, cl. 3.

⁶ Const. Art. I, § 9, cl. 2.

⁷ Const. Art. III, § 3.

⁸ *Ensign v. Pennsylvania*, 227 U. S. 592, 57 L. ed. 658; *Eilenbecker v. Plymouth County*, 134 U. S. 35, 33 L. ed. 801; *Ex parte Watkins*, 7 Pet. 573, 8 L. ed. 786; *Gasquet v. Lapeyre*, 242 U. S. 367, 61 L. ed. 367; *People v. Lynch*, 11 Johns. (N. Y.) 553; *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211.

⁹ *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Yarbrough*

v. North Carolina, 196 N. C. 284, 145 N. E. 563; *Gaines v. State of Washington*, 277 U. S. 1, 72 L. ed. 793.

¹⁰ See Constitutions of the several states. For example, Art. I of Constitution of Washington, 1 Rem. Rev. Stat. of Wash. 347-390. See also Constitution of New Jersey, Art. I, §§ 7-11; Constitution of New York, Art. I, § 4; Constitution of North Carolina, Art. I, §§ 11-17; Constitution of North Dakota, Art. I, §§ 5-8, 13-16.

¹¹ Const. Art. I, § 10, cl. 1.

¹² Amendment XIV, § 1.

personal to the accused, the general rule is that he may waive them, except that the organic law in most states requires that the accused shall be tried by a jury and that he be present at the trial.¹³

§ 301. **Presentment and Indictment.** The Fifth Amendment, requiring a presentment or indictment by a grand jury was merely the affirmance of the rule of the common law,¹⁴ which dated back to the time of King Ethelred II (978-1016).¹⁵ The Amendment is a limitation upon Congress as well as the Federal courts.¹⁶ It applies to territorial governments, if incorporated into the union. It does not extend to unorganized territorial governments except as provided by an Act of Congress,¹⁷ and under the express words of the Amendment it does not apply to cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger.¹⁸

Congress has supplemented the Amendment with a statute providing for a grand jury to consist of not less than sixteen nor more than twenty-three persons, which is summoned in each District Court of the United States by the senior judge.¹⁹ Such a jury must be impartial, and no citizen otherwise qualified can be disqualified from serving on account of race, color, or previous condition of servitude.²⁰ Such a disqualification amounts to a denial of the constitutional rights of the defendant.²¹ The grand jury is an indispensable part of the machinery of the Federal courts, and one accused of a capital or otherwise infamous crime or felony cannot be prosecuted except on a true bill found by it.²² Misdemeanors and crimes, other than those classified as capital or infamous, may be prosecuted either by information or indictment as the circum-

¹³ Powers v. United States, 223 U. S. 303, 56 L. ed. 448; State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; State v. Rogers, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914 A 867.

¹⁴ Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89.

¹⁵ Taswell-Langmead, English Constitutional History, 145-149.

¹⁶ Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89.

¹⁷ Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016; Talton v.

Mayes, 163 U. S. 376, 41 L. ed. 196.

¹⁸ Kurtz v. Moffitt, 115 U. S. 500, 29 L. ed. 458; Ex parte Richard Quirin, 317 U. S. 1, 87 L. ed. 3.

¹⁹ 28 USC 419-421.

²⁰ 8 USC 44; Smith v. Texas, 311 U. S. 128, 85 L. ed. 84.

²¹ Hale v. Kentucky, 303 U. S. 613, 82 L. ed. 1050.

²² Application of Texas Co., 27 F. Supp. 847.

stances of each case may seem to require, and as the common law would sanction.²³

The term indictment as used in the Amendment means a written accusation against one or more persons of a capital or otherwise infamous crime, presented to, and preferred upon oath or affirmation by a grand jury legally convoked. A presentment is properly that which the grand jurors find and present to the court from their own knowledge or information. Every indictment, therefore, is a presentment, but not every presentment is an indictment.²⁴ An infamous crime is one punishable by imprisonment in the state or Federal penitentiary.²⁵ All felonies are infamous crimes.²⁶

There seems to be a difference of opinion as to whether one accused of crime may waive the formality of an indictment. Some courts have held that an indictment is jurisdictional, while others have held it to be a personal privilege which the accused may waive.²⁷

§ 302. Twice in Jeopardy. Under the Fifth Amendment, no man can be put twice in jeopardy of life or limb for the same offense. This means that a person cannot be put on trial a second time for an offense of which he has once been acquitted or convicted or placed in jeopardy.²⁸ An accused is placed in jeopardy within the meaning of the Amendment whenever he is put on trial in a court of competent jurisdiction, with a valid indictment; and he has been arraigned and pleaded and a lawful jury has been sworn to try the case and render a verdict, even before the reading of the indictment or the introduction of testimony.²⁹

This guaranty does not deny the court the power to grant a new trial or to discharge the jury in cases of necessity. An accused, therefore, has not been placed in jeopardy when a jury has been necessarily discharged for the following reasons: (a) When the court is compelled by law to be adjourned before the jury can agree upon a verdict; (b) when a prisoner by his own misconduct

²³ *United States v. Shepard*, 1 Abb. (U. S.) 431, 27 Fed. Cas. 16,273.

²⁴ 1 *Bouvier Law Dict.* (3d Rev.) 1542.

²⁵ *In re Claasen*, 140 U. S. 205, 35 L. ed. 409.

²⁶ *Falconi v. United States* (C. C. A.) 280 Fed. 766.

²⁷ *Ex parte McClusky*, 40 Fed. 71; *United States v. Gill*, 55 F. (2d) 399.

²⁸ *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300; *Bens v. United States* (C. C. A.) 266 Fed. 152.

²⁹ *Green v. State*, 147 Tenn. 299, 247 S. W. 84, 28 A. L. R. 842.

places it beyond the power of the jury to investigate his case, or the visitation of providence prevents their being able to attend the trial; and (c) when there is no possibility for the jury to agree upon and return a verdict.³⁰

The test of the guaranty is not whether the accused has been tried for the same act but whether he has been in jeopardy for the same offense,³¹ and where the offenses are different there is no violation of the clause.³² A single act may be an offense against two statutes, and, where the offense defined by one embraces an element not included in the other, an acquittal under one statute does not exempt the accused from prosecution under the other.³³ A single act may be an offense against state laws and also an offense against Federal laws. For example, the courts have held that an accused may be tried in a state court for liquor in possession, and may be also tried upon the same facts in the Federal court.³⁴ The Supreme Court has held that the double jeopardy provision does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained.³⁵ An accused is put in jeopardy the second time for the same offense only when the offense charged in the later indictment is identical with the offense charged in the prior indictment on which the accused has been prosecuted; or because the offense charged in the later indictment was a part of the offense charged in the prior indictment and was not a separate, distinct offense.³⁶

The privilege is a personal one, which may be waived either expressly or impliedly, and a waiver is always implied, when the accused fails to assert his rights under the guaranty at his earliest opportunity, and his objection comes too late when it is raised

³⁰ Mahala v. State, 10 Yerg. (Tenn.) 532, 31 Am. Dec. 591; Green v. State, 147 Tenn. 299, 247 S. W. 84, 28 A. L. R. 842; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165.

³¹ United States v. One Buick Coach, 34 F. (2d) 318.

³² Sims v. Rives, 66 App. D. C. 24, 84 F. (2d) 871.

³³ Slade v. United States (C. C. A.) 85 F. (2d) 786.

³⁴ State v. O'Brien, 106 Vt. 97, 170 Atl. 98. See also Albrecht v. United States, 273 U. S. 1, 71 L.

ed. 505; United States v. Lanza, 260 U. S. 377, 67 L. ed. 314; Screws v. United States, 325 U. S. 91, 89 L. ed. 1495 (offence by a state officer against the state may also be an offence against the Federal government).

³⁵ Jerome v. United States, 318 U. S. 101, 87 L. ed. 640.

³⁶ United States v. Brimsdon, 23 F. Supp. 510; United States v. Barnhart, 22 Fed. 285. See also Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 1 Ann. Cas. 655.

for the first time upon a motion in arrest of judgment.³⁷ But the courts have held that the constitutional right of the accused was not waived when his failure to assert it was due to lack of funds to employ counsel to raise the question for him.³⁸

§ 303. Right to Speedy and Public Trial. The right of all accused persons to have a speedy and impartial trial has been guaranteed from the earliest times, first by the Magna Charta, then by the petition of rights, then by constitution of the several American states, and finally by the Sixth Amendment to the Constitution of the United States. The purpose of the Sixth Amendment was to prevent the interference of the Federal government with the rights of the states and their citizens, and this amendment therefore does not apply to the acts of the legislatures of the several states. This ancient right, however, has been safeguarded in practically all, if not all, of the several state constitutions, both those adopted prior to 1787 and those adopted at a later date.³⁹

A speedy trial is one free from vexatious, capricious and oppressive delays created by the officers of the law.⁴⁰ The right is necessarily a relative one. It is consistent with delays and depends upon circumstances. While it secures rights to the defendant, it does not preclude the rights of public justice.⁴¹ If the accused, however, is denied a trial at a reasonably early opportunity, he is entitled to be discharged or to have the prosecution quashed,⁴² and in many states this time is fixed by statute.⁴³ The right of a speedy trial is one personal to the defendant. It may be waived by him,⁴⁴ but it cannot be used to force him to trial before he has had time to prepare or to present his defense.⁴⁵

³⁷ *Levin v. United States*, 5 F. (2d) 598.

³⁸ *People ex rel. Pulko v. Murphy*, 244 App. Div. 382, 280 N. Y. S. 405.

³⁹ *Nixon v. State*, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601. For example, see Constitution of Oregon, Art. I, § 11; Constitution of Pennsylvania, Art. I, § 9; Constitution of Rhode Island, Art. I, § 10.

⁴⁰ *Nixon v. State*, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601.

⁴¹ *Beavers v. Haubert*, 198 U. S. 86, 49 L. ed. 950.

⁴² *Daniels v. United States* (C. C. A.) 17 F. (2d) 339; *Phillips v. United States* (C. C. A.) 201 Fed. 259.

⁴³ *Nixon v. State*, 2 Smedes & Marshall (Miss.) 497, 41 Am. Dec. 601.

⁴⁴ *Murray v. State*, 19 Okla. Cr. R. 322, 198 Pac. 973.

⁴⁵ *Fuson v. Commonwealth of Kentucky*, 199 Ky. 804, 251 S. W. 995.

The accused has a right to a public trial, and he cannot be deprived of it without his consent. This is for the benefit of the accused so that the friends of the accused and the public may see that justice is done. It does not, however, mean the general public without regulation, but representatives of the public with such reasonable exclusion as may seem necessary.⁴⁶ The court may, in proper cases, limit the number of persons that may be in the courtroom during the trial. It may exclude noisy and boisterous persons, and it may exclude young people in cases involving morals and public decency.⁴⁷ For example, in a prosecution for rape of a ten-year-old prosecuting witness who was humiliated and embarrassed by the crowd in the courtroom, it was held proper to exclude the public,⁴⁸ but on the other hand, in the trial of a case for train robbery, the exclusion of all persons, except two relatives, a few newspaper men and several attorneys, was held to be a denial of the constitutional right of the defendant.⁴⁹

§ 304. Right to Trial by Impartial Jury. The expression "trial by jury" is so well understood by all English speaking peoples that no American Constitution has ever assumed to define it.⁵⁰ The Constitution of 1787 merely required that all crimes, except in cases of impeachment, shall be tried in the state where the crime was committed, or, if not within a state, at such place as Congress may direct.⁵¹ The Sixth Amendment amplified this requirement by adding that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime was committed.⁵² These provisions interpreted in the light of the common law have defined the essential attributes of a trial by jury to be that the trial should be in the presence and under the superintendence of a judge having power to instruct the jurors as to the law and advise them in respect to

⁴⁶ See note 39, *supra*; *People v. Harris*, 302 Ill. 590, 135 N. E. 75.

⁴⁷ *Nixon v. State*, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601.

⁴⁸ *Hogan v. State*, 191 Ark. 437, 86 S. W. (2d) 931.

⁴⁹ *Davis v. United States* (C. C. A.) 247 Fed. 394, L. R. A. 1918 C 1164.

⁵⁰ *Lommen v. Minneapolis Gas-light Co.*, 65 Minn. 196, 33 L. R. A. 437; *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680. See also *District of Columbia v. Colts*, 282 U. S. 63, 75 L. ed. 177; *Alton v. United States*, 281 U. S. 276, 74 L. ed. 854, 70 A. L. R. 263.

⁵¹ Const. Art. III, § 2, cl. 3.

⁵² Amendment VI.

the facts;⁵³ that the jury must consist of twelve persons; that it must be impartial and that the exclusion of a particular class of persons from the jury list solely because of race or color is a violation of the constitutional rights of the defendant;⁵⁴ that it must be drawn from the vicinage, that is, the district and the state, in which the crime was committed; that the jurors must be sworn; that the jury must be independent; that it must have the right to render a verdict; that the verdict must be unanimous; and that its members cannot be punished for their verdict.⁵⁵

Crimes and accusations, which by the regular course of the common law and the established modes of procedure, were not subjects of jury trial are not within the constitutional guaranty. These crimes include such offenses as those against police regulations,⁵⁶ an action to recover a penalty under an Act of Congress,⁵⁷ proceedings for contempt of court,⁵⁸ punishment for violation of an injunction,⁵⁹ proceedings for deportation of an anarchist alien,⁶⁰ and numerous other offenses described as petty or quasi-criminal.⁶¹ The provisions of the Constitution and of the Sixth Amendment were intended to apply exclusively to the powers exercised by the Federal government, whether by Congress or the judiciary.⁶² They apply also to the territories of the United States, but they do not apply to territories belonging to the United States and which

⁵³ *Patton v. United States*, 281 U. S. 276, 74 L. ed. 854.

⁵⁴ *Hale v. Commonwealth of Kentucky*, 303 U. S. 613, 82 L. ed. 1050; *Smith v. Texas*, 311 U. S. 128, 85 L. ed. 84; *Pierre v. State of Louisiana*, 306 U. S. 354; 83 L. ed. 757; *Hollins v. Oklahoma*, 295 U. S. 394, 79 L. ed. 1500; *Norris v. Alabama*, 294 U. S. 587, 79 L. ed. 1074.

⁵⁵ *Lommen v. Minneapolis Gas-light Co.*, 65 Minn. 196, 33 L. R. A. 437; *Utah v. Bates*, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33; *Case of Edward Bushell*, *Broom's Constitutional Law*, 115-139; *Hammond v. Howell*, *Thomas Leading Cases on Constitutional Law (English)* 147; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

⁵⁶ *In re Cross*, 20 Fed. 824. But see *District of Columbia v. Colts*, 282 U. S. 63, 75 L. ed. 177.

⁵⁷ *Hepner v. United States*, 213 U. S. 103, 53 L. ed. 720, 16 Ann. Cas. 960, 27 L. R. A. (N. S.) 739.

⁵⁸ *In re Debs*, 158 U. S. 594, 39 L. ed. 1092.

⁵⁹ *State v. Froehlich*, 316 Ill. 77, 146 N. E. 733.

⁶⁰ *United States v. Williams*, 194 U. S. 289, 48 L. ed. 979.

⁶¹ *District of Columbia v. Clawans*, 300 U. S. 617, 81 L. ed. 843; *District of Columbia v. Colts*, 282 U. S. 63, 75 L. ed. 177.

⁶² *Eilenbecker v. Plymouth County*, 134 U. S. 35, 33 L. ed. 801.

have not been incorporated into the union.⁶³ They do not apply to consular courts,⁶⁴ or to a trial by court-martial.⁶⁵

These provisions are not a limitation upon the powers of the states,⁶⁶ although it has been argued at times that they have been extended by the Fourteenth Amendment. Many state constitutions, however, contain substantially similar guaranties.⁶⁷ Under such constitutions, the state legislatures cannot abridge the right of the accused which was fully secured to him by the common law at the time of the adoption of the Constitution, and his rights are the same or similar to those defined by the Federal Constitution and the Sixth Amendment. The constitutions of other states give the legislature express power to deal with the question of trials by jury, and to prescribe rules and regulations governing these trials and the verdicts of juries. Under these constitutions the legislatures may provide for a jury of less than twelve persons, and may make such other regulations as do not deny the defendant of his life or liberty without due process of law.⁶⁸

The accused may waive this guaranty by pleading guilty,⁶⁹ or by consenting to be tried by less than the constitutional number of jurors, or by waiving a jury trial.⁷⁰ Some state courts have held that an accused cannot waive this right in capital cases and cases involving felonies.⁷¹

§ 305. Right of Defense. Every person accused of crime has the constitutional right to make a defense. This guaranty includes

⁶³ Balzac v. Porto Rico, 258 U. S. 298, 66 L. ed. 627.

⁶⁴ In re Ross, 44 Fed. 185. See also Ross v. McIntyre, 140 U. S. 459, 35 L. ed. 581.

⁶⁵ Kahn v. Anderson, 225 U. S. 1, 65 L. ed. 469; Ex parte Richard Quirin, 317 U. S. 1, 87 L. ed. 3.

⁶⁶ Eilenbecker v. Plymouth County, 134 U. S. 35, 33 L. ed. 801; Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912 C 1093.

⁶⁷ Gaines v. Washington, 277 U. S. 81, 72 L. ed. 793; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597. For example, see Constitution of Rhode Island, Art. I, §§ 10, 15; Constitution of South Carolina, Art. I, §§ 18, 25.

⁶⁸ State v. Bates, 14 Utah 293, 43 L. R. A. 33; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597. For example, see Constitution of Washington, Art. I, §§ 21-22, 25-26; Constitution of Wisconsin, Art. I, § 5; Constitution of Oklahoma, Art. I, §§ 18-20; Constitution of Virginia, Art. I, § 8.

⁶⁹ West v. Gammon (C. C. A.) 98 Fed. 426.

⁷⁰ Adams v. United States, 317 U. S. 269, 87 L. ed. 268.

⁷¹ Queenan v. Oklahoma, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324; State v. Rogers, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914 A 876.

the right (a) to be informed of the nature and cause of the accusation; (b) to be confronted with the witnesses against him; (c) to have compulsory process for obtaining witnesses in his favor; (d) to have the assistance of counsel for his defense;⁷² and (e) to be prosecuted fairly. The provisions contained in subdivisions (a), (b), (c), and (d) were specifically included in the Sixth Amendment in order to place them beyond the power of either Congress or the courts to abrogate.⁷³ The requirement contained in subdivision (e) was not set forth in the Amendment but may be said to have been implied from the provisions therein expressed. It rests upon the decisions of the Supreme Court. Similar rights exist under most, if not all, state constitutions, and the Supreme Court has held that they are protected under the provisions of the Fourteenth Amendment because they involve those fundamental principles of liberty and justice which lie at the base of our civil and political institutions.⁷⁴

(a) *To be informed of the nature and cause of the accusation.* This provision means that not only must all the elements of the offense be stated in the indictment, but they must also be stated with clearness and certainty and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him reasonably to understand not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof. He cannot be subjected to the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fulness of description of the alleged offense.⁷⁵ The indictment must be read to the defendant.⁷⁶ He must be given time in which to prepare his defense.⁷⁷

⁷² Amendment VI.

⁷³ United States v. Potter, 56 Fed. 83.

⁷⁴ Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 90 A. L. R. 575; Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527; Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 48 A. L. R. 1102.

⁷⁵ United States v. Potter, 56 Fed. 83.

⁷⁶ Johnson v. United States, 225 U. S. 405, 56 L. ed. 1142; Logan v. United States, 144 U. S. 263, 36 L. ed. 429.

⁷⁷ United States v. Van Duzee, 140 U. S. 173, 35 L. ed. 399; Commonwealth (Pennsylvania) v. O'Keefe, 298 Pa. 169, 148 Atl. 73.

(b) *To be confronted with witnesses.* The primary object of this provision was to prevent depositions or ex parte affidavits, such as are sometimes used in civil cases, being used against an accused in lieu of a personal examination and cross-examination of witnesses. It was intended to give the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence and give to him the opportunity of testing their recollection in the exercise of the right of cross-examination.⁷⁸ This, the law says, he shall under no circumstances be deprived of, and the Supreme Court of Utah held that it was error to permit a witness to turn her back to the defendant who was ordered by the court to be removed to a distance of 24 feet, but proof may be made, wholly or in part, by circumstantial evidence.⁷⁹ The admission of dying declarations, being a principle established long prior to the adoption of the Constitution, is an exception to the requirements of this provision.⁸⁰

Neither is the provision infringed by permitting the testimony of witnesses sworn upon a former trial of the same indictment to be read against the accused, when such witnesses have since died, and when a copy of the stenographic report of the former trial is supported by the testimony of the stenographer that it is a correct transcript of the testimony of the deceased witnesses.⁸¹ If a witness is absent through the wrongful procurement of the defendant, competent evidence may be admitted to supply the place of that which he has kept away.⁸² A defendant may waive the right to be confronted with the witnesses against him by consenting to the admission of testimony.⁸³

(c) *To have compulsory process for obtaining witnesses.* Although at common law one accused of a felony could not demand compulsory process to secure the attendance of witnesses, the right was guaranteed by the Sixth Amendment.⁸⁴ This amendment re-

⁷⁸ *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409; *State v. Gaetano*, 96 Conn. 306, 114 Atl. 82, 15 A. L. R. 458.

⁷⁹ *State v. Mannion*, 19 Utah 505, 57 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753; *Tot v. United States*, 319 U. S. 463, 87 L. ed. 1519.

⁸⁰ *Kirley v. United States*, 174 U. S. 1, 43 L. ed. 890.

⁸¹ *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409.

⁸² *Reynolds v. United States*, 98 U. S. 160, 25 L. ed. 244.

⁸³ *Grove v. United States*, 3 F. (2d) 965; *Price v. United States*, 14 App. D. C. 391.

⁸⁴ *Pittman v. State*, 51 Fla. 94, 41 So. 385, 8 L. R. A. (N. S.) 509; *Kellar v. State*, 123 Ind. 110, 23 N. E. 1138, 18 Am. St. Rep. 318.

lates only to prosecutions in the Federal courts. It does not in any way limit the powers of state courts, but most state constitutions contain similar provisions.⁸⁵

The provision guarantees the right of compelling the attendance of witnesses through the issuance of subpoenas as in civil cases.⁸⁶ The defendant cannot compel the prosecution to secure the attendance of his witnesses,⁸⁷ but it is the duty of the court to issue the subpoenas or to send for the witnesses wherever they may be had within the jurisdiction of the court and, if the defendant is unable to bear the cost, at the expense of the government.⁸⁸ If the witness lives beyond the jurisdiction of the court, the defendant is entitled to a commission to take the deposition of the witness,⁸⁹ and to a reasonable time to secure the evidence in this manner.⁹⁰

(d) *To have the assistance of counsel.* The accused is guaranteed the right of having the assistance of counsel in the preparation of and in the presenting of his defense.⁹¹ "Historically and in practice, in our own country at least," remarked Justice Sutherland, "it (a trial) has always included the right to the aid of counsel when desired and provided by the party asserting the right. . . . If charged with a crime he (the accused) is incapable generally, of determining for himself, whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence. . . . He lacks the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." The Supreme Court has said that the denial of this right is a violation of the due process clause.⁹²

⁸⁵ *Cassidy v. State*, 201 Ind. 311, 168 N. E. 18, 66 A. L. R. 622; *Pittman v. State*, 5 Fla. 94, 41 So. 385, 8 L. R. A. (N. S.) 509. For example, see Constitution of Oklahoma, Art. I, § 20; Constitution of Wyoming, Art. I, § 14.

⁸⁶ *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305.

⁸⁷ *Kellar v. State*, 123 Ind. 110, 23 N. E. 1138, 18 Am. St. Rep. 318.

⁸⁸ *United States v. Kenneally*, 26 Fed. Cas. No. 15522.

⁸⁹ *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305.

⁹⁰ *Haskins v. Commonwealth*, 216 Ky. 358, 287 S. W. 924.

⁹¹ *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. ed. 674, 90 A. L. R. 575; *Rice v. Olson*, 324 U. S. 786, 89 L. ed. 1367.

⁹² *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527; *Tomkins v. Missouri*, 323 U. S. 485, 89 L. ed. 407; *Hawk v. Olson* — U. S. —, 90 L. ed. —.

Failure to give the defendant sufficient time and opportunity to secure competent counsel of his own choice is not only a violation of the Sixth Amendment in the Federal courts, but may constitute a denial of due process of law under the provisions of the Fourteenth Amendment, if the trial is in the state courts.⁹³ In many jurisdictions the courts have held that the accused shall be guaranteed this right at every stage of the proceedings, and that it is a violation of his rights to require him to plead in the absence of his counsel. A plea of guilty obtained through misrepresentation without the benefit of counsel was held to be a denial of due process of law.⁹⁴ But the Supreme Court has also said that an accused may competently and intelligently waive the right to assistance of counsel.⁹⁵ The accused has no right to be heard by himself, if he is represented by counsel, but he may discharge his counsel during a trial, and take charge of his own case.⁹⁶

The right to have the assistance of counsel includes the right to communicate and consult freely with him at all stages of the proceedings even before trial has commenced and after it has been completed,⁹⁷ and even after the defendant has been confined to the penitentiary.⁹⁸ The privilege to full and confidential consultation with counsel with no other person present to hear what was said is a material, substantial right essential to justice, which cannot be denied.⁹⁹

If the accused is unable to employ counsel, it is the duty of the court to appoint competent counsel for him. In Federal courts, this right is guaranteed by statute,¹⁰⁰ and in state courts the right rests either upon the express provisions of the constitutions or

⁹³ Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527; Avery v. Alabama, 308 U. S. 444, 84 L. ed. 377; Johnson v. Zerbst, 304 U. S. 458, 82 L. ed. 1461; Betts v. Brady, 316 U. S. 455, 86 L. ed. 1595; White v. Ragen, 324 U. S. 760, 89 L. ed. 1348.

⁹⁴ State v. Heyer, 89 N. J. L. 187, 98 Atl. 413, Ann. Cas. 1918 D 284; Smith v. O'Grady, 312 U. S. 329, 85 L. ed. 859; Waley v. Johnston, 316 U. S. 101, 86 L. ed. 1302.

⁹⁵ Adams v. United States, 317 U. S. 269, 87 L. ed. 268.

⁹⁶ State v. Townley, 149 Minn. 5, 182 N. W. 773, 17 A. L. R. 253;

People v. Northcott, 209 Cal. 639, 287 Pac. 634, 70 A. L. R. 806.

⁹⁷ State ex rel. Tucker v. Davis, 9 Okla. Cr. R. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083; Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488, 54 A. L. R. 1220.

⁹⁸ Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488, 54 A. L. R. 1220.

⁹⁹ State ex rel. Tucker v. Davis, 9 Okla. Cr. R. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083; Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488, 54 A. L. R. 1220.

¹⁰⁰ 18 USC 563.

statutes, or upon the determination of the courts,¹⁰¹ but the government is not liable for the fees of counsel thus assigned.¹⁰²

(e) *To be prosecuted fairly.* An accused has the right to be prosecuted fairly. The prosecuting attorney is a representative of the government, and must not be permitted to arouse the passion or engender the prejudice of the jurors. His conduct and remarks cannot be offensive to the dignity and good order with which all proceedings in court should be conducted. For example, although the prosecutor may present his case with vigor and enthusiasm, and even stirring eloquence, he will not be permitted to misstate facts; to put words in the mouths of witnesses which were not said; to intimate, untruthfully, that statements were made to him personally out of court; and generally to argue with witnesses and to bully and intimidate them.

"The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," declared Chief Justice Stone (quoting Justice Sutherland), "and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."¹⁰³

§ 306. Immunity from Self-Incrimination. The Fifth Amendment provides that no person shall be compelled to be a witness against himself, or to furnish evidence against himself. While this provision regulates the procedure of Federal courts only, most state constitutions contain similar provisions.¹⁰⁴ The exemption is

¹⁰¹ *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527. For example, see Constitution of New Jersey, Art. 1, § 8; Constitution of Wyoming, Art. I, § 7.

¹⁰² *Nabb v. United States*, 1 Ct. Cls. 173.

¹⁰³ *Berger v. United States*, 295 U. S. 78, 79 L. ed. 1314; *Viereck v. United States*, 318 U. S. 236, 87 L. ed. 734.

¹⁰⁴ *Ensign v. Pennsylvania*, 227 U. S. 592, 57 L. ed. 658; *Snyder v. Massachusetts*, 291 U. S. 97, 78

not guaranteed by the due process clause of the Fourteenth Amendment, as it was not an essential part of the due process clause at common law, but was developed as a beneficent rule of evidence in the course of judicial decision.¹⁰⁵

The principle, however, is more than a technical rule of evidence. It is a substantial right which is mandatory and which cannot be dispensed with at the discretion of the courts.¹⁰⁶ "The object of this amendment," observed Justice Brown in a leading case, "is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. If the testimony relates to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which the defendant has already received a pardon or is guaranteed immunity, the amendment does not apply."¹⁰⁷

The provision as interpreted by the courts and applied to particular situations has been given the following constructions: (a) The privilege may be invoked in one's own case or in a civil or criminal action involving another individual or before a grand jury,¹⁰⁸ or in bankruptcy proceedings,¹⁰⁹ or in proceedings before a nonjudicial officer or body;¹¹⁰ (b) the privilege applies to both oral testimony and the compulsory production by an individual of his books and papers;¹¹¹ (c) the privilege will protect the accused

L. ed. 674, 90 A. L. R. 575; *State v. Rixon*, 180 Minn. 573, 231 N. W. 217, 68 A. L. R. 1501; *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227; *Jessner v. State*, 202 Wis. 184, 231 N. W. 634, 71 A. L. R. 1005. For example, see *Constitution of Wyoming*, Art. I, § 10; *Constitution of Wisconsin*, Art. I, § 8. See also *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699.

¹⁰⁵ *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97.

¹⁰⁶ *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110; *State ex*

rel. LaFollette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A. L. R. 348.

¹⁰⁷ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652.

¹⁰⁸ *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *Ex parte January*, 295 Mo. 653, 246 S. W. 241.

¹⁰⁹ *McCarthy v. Arndstein*, 266 U. S. 34, 69 L. ed. 158.

¹¹⁰ *State v. Rixon*, 180 Minn. 573, 231 N. W. 217, 68 A. L. R. 1501.

¹¹¹ *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746; *State v. Davis*, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640; *Hale v. Henkel*,

from a physical examination,¹¹² or from being compelled to exhibit himself at the trial,¹¹³ but he may be required to stand up for the purpose of being identified by a witness;¹¹⁴ (d) the operator of an automobile may be required, in case of an accident, to stop and give his name, address, and license number, and this requirement has been held not to be a violation of the guaranty;¹¹⁵ (e) the privilege is enjoyed by both citizens and aliens,¹¹⁶ but it does not extend to corporations, or to an officer, agent or employee or a former officer of a corporation;¹¹⁷ (f) evidence, such as books, letters and papers, obtained from the defendant by fraud, theft, stealth or secret taking, or secured through an unlawful search, is a violation of this immunity.¹¹⁸

The guaranty is a personal privilege and may be waived.¹¹⁹ If the accused voluntarily takes the witness stand in his own behalf, he subjects himself to the same rules of cross examination as other witnesses,¹²⁰ but his constitutional privilege is not waived if he is forced to testify through fear of adverse inferences if he fails to do so.¹²¹ Likewise, admissions and confessions voluntarily made may be used in evidence, but a confession through coercion and duress may not be used.¹²² The mere fact that a confession was

201 U. S. 43, 50 L. ed. 652; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, Ann. Cas. 1912 D 558, *Essgee Co. v. United States*, 262 U. S. 151, 67 L. ed. 917.

¹¹² *State v. Height*, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 437.

¹¹³ *Cooper v. State*, 86 Ala. 610, 6 So. 110, 4 L. R. A. 766, 11 Am. St. Rep. 84.

¹¹⁴ *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741.

¹¹⁵ *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915 A 161.

¹¹⁶ *United States v. Brooks*, 284 Fed. 908.

¹¹⁷ *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, Ann. Cas. 1912 D 558; *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 88 L. ed. 1024.

¹¹⁸ *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915 B 834, Ann. Cas. 1915 C 1177.

¹¹⁹ *Scribner v. State*, 9 Okla. Cr. R. 465, 132 Pac. 933, Ann. Cas. 1915 B 381; *United States v. White*, 322 U. S. 694, 88 L. ed. 1542, 152 A. L. R. 1202.

¹²⁰ *Raffel v. United States*, 271 U. S. 494, 70 L. ed. 1054.

¹²¹ *Powell v. Commonwealth*, 167 Va. 558, 189 S. E. 433, 110 A. L. R. 90; *United States v. Monia*, 317 U. S. 424, 87 L. ed. 376 (immunity under Federal Anti-trust Act not waived by failure to claim it).

¹²² *Hoch v. People*, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327; *Lyons v. Oklahoma*, 322 U. S. 596, 88 L. ed. 1481; *Ward v. Texas*, 316 U. S. 547, 86 L. ed. 1663; *Malinski v. New York*, 324 U. S. 401, 89 L. ed. 1029.

made while the accused was in the custody of the police does not render it inadmissible, but if it is obtained in disregard of the liberties deemed fundamental by the constitution, it cannot be made the basis for a conviction.¹²³ The Supreme Court has held that this limitation applies to trials in state courts as well as those in Federal courts.¹²⁴ If the witness is granted immunity from prosecution, he may be required to testify either in a court of law or before an administrative commission, such as the Interstate Commerce Commission.¹²⁵

The provisions of the amendment protect only against the invasion of the civil liberties of the accused by the government whose conduct they alone limit. For example, testimony given in a civil action in a state court under a statutory provision for immunity may be used in a criminal proceeding in the Federal court. The Supreme Court has held that the admission of such evidence did not deprive him of the protection of the Fifth Amendment, as a state, by operating within its constitutional power, cannot restrict the operations of the Federal government.¹²⁶

§ 307. Excessive Bail. Amendment VIII provides that excessive bail shall not be required. This provision is a limitation upon the powers of Congress,¹²⁷ as well as a limitation upon the discretion of the courts of the United States exercising criminal jurisdiction.¹²⁸ It has been held not to be a limitation upon the powers of the states,¹²⁹ although individual justices have asserted that the Fourteenth Amendment has made it applicable to the states.¹³⁰ Most of the constitutions of the several states contain similar provisions.¹³¹

¹²³ McNabb v. United States, 318 U. S. 332, 87 L. ed. 819; Anderson v. United States, 318 U. S. 350, 87 L. ed. 829.

¹²⁴ Ashcraft v. Tennessee, 322 U. S. 143, 88 L. ed. 1192.

¹²⁵ Brown v. Walker, 161 U. S. 591, 40 L. ed. 819; Glickstein v. United States, 222 U. S. 139, 56 L. ed. 128.

¹²⁶ Brown v. Walker, 161 U. S. 591, 40 L. ed. 819; United States v. Murdock, 284 U. S. 141, 76 L. ed. 210, 82 A. L. R. 1376.

¹²⁷ Martin v. Johnson, 11 Tex. Civ. App. 633.

¹²⁸ Ex parte Watkins, 7 Pet. 575, 8 L. ed. 786

¹²⁹ In re Blake, 107 Vt. 18, 175 Atl. 252; Collins v. Johnston, 237 U. S. 502, 59 L. ed. 1071.

¹³⁰ O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A. L. R. 241 (Justice Etteridge).

¹³¹ Loeb v. Jennings, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; People v. Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918 B 391. See Constitution of Washington, Art. I, § 14. See also Con-

The object of bail is to make certain of the defendant's appearance in court to abide the judgment of the court. It is not allowed or refused on account of the presumed guilt or innocence of the accused, although the existence of a doubt as to accused's guilt and the probability of his appearing for trial are questions which must be considered in fixing the amount of bail to be required.¹³² Other factors to be considered are the ability of the accused to give bail, the nature of the offense, the penalty for the offense charged, the character and reputation of the accused, the health of the accused, the character and strength of the evidence and whether the accused is under bond in other cases.¹³³ The right to bail is not an absolute right, and it may be refused in an action charging a capital offense,¹³⁴ and even in other serious cases. The guaranty is limited to excessive bail, and its purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given,¹³⁵ and thus keep the defendant in captivity for an unreasonable time before his guilt or innocence can be established.¹³⁶ To deprive a defendant of bail if he is entitled to it, amounts to a deprivation of his liberty without due process of law.¹³⁷

§ 308. Excessive Fines—Cruel and Unusual Punishments. The prohibitions against excessive fines and cruel and unusual punishments are included in the provisions of the Eighth Amendment and are subject to the same limitations as the clause relating to excessive bail.¹³⁸ Excessive fines are prohibited by state constitutions, as well as the Federal Constitution,¹³⁹ but a fine will not be adjudged excessive unless it is so disproportioned to the offense

stitution of Wyoming, Art. I, § 6 and Constitution of South Carolina, Art. I, § 19.

¹³² *People ex rel. Sammons v. Snow*, 340 Ill. 464, 173 N. E. 8, 72 A. L. R. 798.

¹³³ *People ex rel. Sammons v. Snow*, 340 Ill. 464, 173 N. E. 8, 72 A. L. R. 798.

¹³⁴ *The King v. Fortier*, 13 Que. K. B. 251, 1 Ann. Cas. 10.

¹³⁵ *United States v. Motlow* (C. C. A.) 10 F. (2d) 657.

¹³⁶ *Barrett v. United States* (C. C. A.) 4 F. (2d) 317.

¹³⁷ *Ex parte McDaniel*, 86 Fla. 145, 97 So. 317.

¹³⁸ *Bergman v. State*, 187 Wash. 622, 60 P. (2d) 699, 106 A. L. R. 1007; *State v. Price*, 124 La. 917, 50 So. 794, 134 Am. St. Rep. 523.

¹³⁹ *Sinclair v. State*, 161 Miss. 142, 132 So. 581, 74 A. L. R. 241. For example, see Constitution of South Carolina, Art. I, § 9; Constitution of Texas, Art. I, § 9; Constitution of Delaware, Art. I, § 11.

as to interfere with the protection of the citizen.¹⁴⁰ While a court may not take into consideration the defendant's ability to pay, a fine that seriously impairs his ability to make a living or to gain a business livelihood has been adjudged excessive.¹⁴¹ A fine within the limits fixed by a statute is within the discretion of the trial judge.¹⁴²

The provisions of the Federal and state constitutions, prohibiting cruel and unusual punishments, were designed to protect the people not only from barbarous methods of inflicting punishment, but to prevent harsh, unjust and unreasonable punishments considering the act prohibited in relation to the punishment imposed.¹⁴³ But a punishment will not be adjudged cruel and unusual unless it is a barbarous one unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community.¹⁴⁴ For example, punishment by beheading, burning at the stake, quartering, disemboweling alive and other forms of punishment which have become obsolete, are universally considered cruel and unusual,¹⁴⁵ while punishment of death by hanging, shooting, electrocution, or by the use of lethal gas, are not considered either cruel or unusual.¹⁴⁶

Other forms of punishment not considered in violation of this prohibition are confining a prisoner on a bread and water diet,¹⁴⁷ exclusion of an alien from the United States,¹⁴⁸ imprisonment for costs,¹⁴⁹ sterilization and asexualization in the case of idiocy, im-

¹⁴⁰ State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; Iowa v. Webb, 202 Iowa 633, 210 N. W. 751, 49 A. L. R. 1389.

¹⁴¹ State ex rel. Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561.

¹⁴² McCollom v. State, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171.

¹⁴³ State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30.

¹⁴⁴ People v. Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918 B 396.

¹⁴⁵ Re Birdsong, 38 Fed. 599, 4

L. R. A. 628; Hobbs v. State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; People v. Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918 B 391.

¹⁴⁶ State v. Gee Jon, 46 Nev. 418, 211 Pac. 676, 30 A. L. R. 1443.

¹⁴⁷ Spencer v. State, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 962.

¹⁴⁸ United States ex rel. Ulrich v. Kellogg, 58 App. D. C. 360, 30 F. (2d) 984, 71 A. L. R. 1210.

¹⁴⁹ People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 236 N. Y. 417, 141 N. E. 901, 30 A. L. R. 1458.

becility, insanity and criminality.¹⁵⁰ In the final analysis, what fines are excessive and what punishments are cruel and unusual are for the legislature to define, and unless the penalty prescribed is clearly and manifestly excessive or cruel and unusual, the courts will not interfere.¹⁵¹

§ 309. **Bill of Attainder.** A bill of attainder is a legislative decree directed against an accused person pronouncing him guilty of crime and passing sentence of death or of attainder upon him. Attainder means an extinction of civil and political rights consequent upon a sentence of death or outlawry.¹⁵² The Federal Constitution prohibits the enactment of bills of attainder by Congress,¹⁵³ and also by the legislatures of the several states.¹⁵⁴ As used in the Constitution, bills of attainder include bills for pains and penalties. The difference between these two bills is that in a bill of attainder a sentence of death is inflicted and in a bill of pains and penalties a sentence less than death is imposed for high offenses such as treason and felony. An example of a bill of attainder was the test oath of loyalty required by the State of Missouri after the Civil War, and providing a penalty for any person holding a public office, practicing a profession or occupying a position of trust without having taken the oath. The Supreme Court held the law to be unconstitutional.¹⁵⁵ But a state law requiring a conviction in the due course of judicial proceedings before a penalty of disfranchisement should attach was held not to be a bill of attainder.¹⁵⁶

§ 310. **Ex Post Facto Laws.** Both the Federal¹⁵⁸ and the state governments¹⁵⁹ are forbidden to enact ex post facto laws. This

¹⁵⁰ *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, Ann. Cas. 1914 B 512; *Buck v. Bell*, 274 U. S. 200, 71 L. ed. 1000; *People v. Biggs*, 9 Cal. (2d) 508, 71 P. (2d) 214, 116 A. L. R. 215.

¹⁵¹ *Bailey v. United States* (C. A.) 74 F. (2d) 451.

¹⁵² *Snodgrass v. Texas* (Tex. Cr. App.), 150 S. W. 162, 41 L. R. A. (N. S.) 1144; *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; *Cummins v. Missouri*, 4 Wall. 277,

18 L. ed. 356. See also *Pierce v. Carskadon*, 16 Wall. 234, 21 L. ed. 276.

¹⁵³ Const. Art. I, § 9, cl. 3.

¹⁵⁴ Const. Art. I, § 10, cl. 1. For example, see Constitution of Delaware, Art. I, § 15 and Constitution of California, Art. I, § 16.

¹⁵⁵ *Cummins v. Missouri*, 4 Wall. 277, 18 L. ed. 356.

¹⁵⁶ *Washington v. State*, 75 Ala. 582, 51 Am. Rep. 479.

¹⁵⁸ Const. Art. I, § 9, cl. 3.

¹⁵⁹ Const. Art. I, § 10, cl. 1. For example, see Constitution of

means that the Constitution forbids the application of any new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer.¹⁶⁰

An *ex post facto* law is a retroactive law. *Ex post facto* means, literally, "from what is done afterwards." As defined by the Supreme Court, it is: "1st. Every law that makes an action done before the passing of the law and which was innocent when done, criminal, and punishes such action; 2nd. Every law that aggravates a crime, or makes it greater than it was when committed; 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed; 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense in order to convict the offender." To this definition may be added any change in procedure retroactive in effect which results in depriving the accused of substantial protection.¹⁶¹

The principle is well settled that this constitutional prohibition applies only to penal statutes. Laws which affect only civil rights or which regulate only civil remedies are not within the prohibition.¹⁶² Neither is deportation of aliens a punishment so as to be subject to the prohibition.¹⁶³ This constitutional provision is a restraint upon Congress or upon the legislative power of the states.¹⁶⁴ It is not a limitation upon the power of the courts to interpret existing statutes, even though their decisions may be erroneous or inconsistent.¹⁶⁵ But the prohibition does apply to the

California, Art. I, § 16 and Constitution of New Hampshire (Declaration of Rights) § 23.

¹⁶⁰ *Lindsey v. Washington*, 301 U. S. 397, 81 L. ed. 1182. See also *Beazell v. Ohio*, 269 U. S. 167, 70 L. ed. 216.

¹⁶¹ *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648. See also *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262; *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204; *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 55 L. ed. 137.

¹⁶² *Re Craven*, 178 La. 372, 151 So. 625, 90 A. L. R. 973; *Kentucky Union Co. v. Kentucky*, 219 U. S.

140, 55 L. ed. 137; *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066; *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 862; *Chambers v. Florida*, 309 U. S. 227, 84 L. ed. 716. See also Chap. 26, *infra*.

¹⁶³ *Mohler v. Eby*, 264 U. S. 32, 68 L. ed. 549.

¹⁶⁴ *Frank v. Mangum*, 237 U. S. 309, 59 L. ed. 969; *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 548, Ann. Cas. 1914 C 224.

¹⁶⁵ *Frank v. Mangum*, 237 U. S. 309, 59 L. ed. 969; *Mitchell v. People*, 76 Colo. 346, 232 Pac. 685, 40 A. L. R. 566.

people of the states adopting or amending their constitutions,¹⁶⁶ and the new or amended constitution cannot, as to past offenses, have the effect of repealing the old one or of denying the offender of the guaranties prescribed by the former constitution.¹⁶⁷

§ 311. **Suspension of Writ of Habeas Corpus.** The writ of habeas corpus is the most famous writ of Anglican law.¹⁶⁸ It is directed to a person detaining another and demanding that he produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.¹⁶⁹ The privilege of this writ is the right of the citizen to be discharged from imprisonment unless legal cause can be shown for his detention,¹⁷⁰ and it is the privilege of the writ, that, under the Constitution, cannot be suspended unless, in the cases of rebellion or invasion, the public safety may require it.¹⁷¹

Congress holds the authority to suspend the writ,¹⁷² but it may authorize the President to suspend the writ whenever, in his judgment, the public safety requires,¹⁷³ and on March 3, 1863 it enacted such a law.¹⁷⁴ But the President cannot suspend the writ without the authority of Congress.¹⁷⁵⁻¹⁷⁶

The courts of the several states may issue writs of habeas corpus, but there is a difference of opinion as to whether Congress has the power to suspend the issuing of the writ by the state courts. Wisconsin courts hold that Congress has the power in case of rebellion or invasion,¹⁷⁷ but the courts of Indiana have adopted the

¹⁶⁶ *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458, Ann. Cas. 1914 C 224. See also *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454, Ann. Cas. 1912 B 691.

¹⁶⁷ *State ex rel. Sherburne v. Baker*, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472.

¹⁶⁸ 2 Pollock and Maitland, *History of English Law* (2nd Ed.) 584, 591.

¹⁶⁹ 1 Bouv. Law Dict. (8th Ed.) 1400.

¹⁷⁰ *In re Dugan*, 6 D. C. 139.

¹⁷¹ Const. Art. I, § 9 cl. 2.

¹⁷² Const. Art. I, § 9 cl. 2; *McCall v. McDowell*, 14 Fed. Cas. No. 8673.

¹⁷³ *Ex parte Milligan*, 4 Wall. 115, 18 L. ed. 281.

¹⁷⁴ *Matter of Oliver*, 17 Wis. 686.

¹⁷⁵⁻¹⁷⁶ *Ex parte Benedict*, 3 Fed. Cas. No. 1292; *Ex parte Merryman*, 17 Fed. 9487.

¹⁷⁷ *Matter of Booth*, 3 Wis. 157.

view that neither Congress nor the President has the power to suspend the writ.¹⁷⁸

§ 312. Treason. The Constitution has said that "treason against the United States shall consist in levying war against them or in adhering to their enemies, giving them aid and comfort."¹⁷⁹ No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Congress cannot extend, nor restrict or define the crime. Its power is limited to prescribing the punishment,¹⁸⁰ and it has fixed this punishment as death, or, in the discretion of the court, imprisonment for not less than five years and a fine of not less than \$10,000, and, with the further provision, that the person convicted shall be incapable of holding any public office in the United States.¹⁸¹ Jurisdiction of cases involving treason against the United States rests exclusively in the Federal courts.¹⁸² But the states are not deprived of the power to enact statutes intended to prevent the teaching of crime, sedition, violence or intimidation as a means of destroying the present social order.¹⁸³

The following principles are now well established: (a) Treason is a breach of allegiance and may be committed by a citizen, who owes perpetual allegiance or by an alien, who owes a local or temporary allegiance.¹⁸⁴ (b) All who engage in a rebellion at any stage of its existence, are principals and not accessories. They are all levying war against the United States.¹⁸⁵ (c) There must be two witnesses to the overt act,¹⁸⁶ and two witnesses to a confession

¹⁷⁸ Griffin v. Wilcox, 21 Ind. 383. For examples of the state constitutional provisions, see Constitution of Texas, Art. I, § 12; Constitution of Utah, Art. I, § 5; Constitution of Nevada, Art. I, § 5.

¹⁷⁹ Const. Art. III, § 3, cl. 1. See also Cramer v. United States, 325 U. S. 1, 89 L. ed. 1441.

¹⁸⁰ United States v. Greathouse, 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15254; United States v. Hoxie, 1 Paine (U. S.) 265, 26 Fed. Cas. No. 15,407.

¹⁸¹ 18 USC 3, cl. 1. For the re-

strictive construction of this act during World War II, see Cramer v. United States, 325 U. S. 1, 89 L. ed. 1441.

¹⁸² People v. Lynch, 11 Johns, (N. Y.) 553.

¹⁸³ State v. Hennessy, 114 Wash. 351, 195 Pac. 211.

¹⁸⁴ Carlisle v. United States, 16 Wall. 154, 21 L. ed. 426.

¹⁸⁵ United States v. Greathouse, 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254.

¹⁸⁶ United States v. Mitchell, 2 Dall. 348, 1 L. ed. 410, 26 Fed. Cas. No. 15,788; Cramer v. United

out of court is not sufficient.¹⁸⁷ Neither are voluntary confessions out of court.¹⁸⁸ (d) To constitute levying war there must be an actual assembly for effecting a treasonable purpose such as overthrowing the government or coercing its conduct.¹⁸⁹ While there must be force used, it is not necessary that there should be any military array or weapons.¹⁹⁰ It is sufficient if those assembled are in a condition to make war even though no actual violence is committed.¹⁹¹ (e) It is treason to oppose by force, numbers or intimidation, a public or general law of the United States, in order to prevent its operation or cause its repeal,¹⁹² or with force and violence to suppress an office of excise, and to compel the resignation of the excise officer so as to render an Act of Congress, in effect, null and void,¹⁹³ but the resistance of the execution of a law of the United States without force and for a private purpose is not treason.¹⁹⁴ (f) The term enemies as used in this clause means subjects of a foreign power in a state of open hostility with the United States.¹⁹⁵ (g) The expression "adhering to their enemies, giving them aid and comfort" means giving intelligence to the enemy with the intent to aid them in their acts of hostility, sending provisions, supplies, or money, or furnishing troops, arms or munitions of war, surrendering military posts, and acts of a like nature.¹⁹⁶ Even the sale of goods to an agent of the enemy, knowing that the agent is buying them for a treasonable purpose, constitutes treason,¹⁹⁷ or the delivering up of prisoners or deserters unless the act is committed in a well-grounded fear of the life of the accused.¹⁹⁸

States, 325 U. S. 1, 89 L. ed. 1441. (defendant is protected at all points by the two-witness requirement).

¹⁸⁷ *United States v. Fries*, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5126.

¹⁸⁸ *United States v. Greiner*, 26 Fed. Cas. No. 15,262.

¹⁸⁹ *Ex parte Bollman*, 4 Cr. 126, 2 L. ed. 554.

¹⁹⁰ *Drucker v. Salomon*, 21 Wis. 626.

¹⁹¹ *United States v. Burr*, 25 Fed. Cas. No. 14,693.

¹⁹² *United States v. Fries*, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5126.

¹⁹³ *United States v. Vigol*, 2 Dall. 346, 1 L. ed. 409, 28 Fed. Cas. No. 16,621.

¹⁹⁴ *United States v. Hanway*, 26 Fed. Cas. No. 15,299.

¹⁹⁵ *United States v. Greathouse*, 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254.

¹⁹⁶ *Law of Treason*, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18271.

¹⁹⁷ *Hanauer v. Doane*, 12 Wall. 347, 20 L. ed. 439.

¹⁹⁸ *United States v. Hodges*, 26 Fed. Cas. No. 15,374.

§ 313. **Corruption of Blood and Forfeiture.** The Constitution protected all persons against the old common-law attainder of treason and forfeiture of estate. It provided that "no attainder of treason shall work a corruption of blood, or forfeiture, except during the life time of the person attainted."¹⁹⁹ No attainder of treason means that there shall be no sentence of attainder upon conviction of the crime of treason.²⁰⁰ Corruption of blood was a common-law penalty under which the person attainted could neither inherit or transmit inheritance, nor could he sue or testify in any court or claim any legal protection or rights because it was considered that his blood had been corrupted.²⁰¹ The term forfeiture as used in this guaranty refers to the general forfeiture of the old common law which was the legal sequence of the conviction of a felon.

The guaranty does not inhibit the forfeiture of specific articles where their use is contrary to law, or as a species of fine, or forfeitures which are made in the exercise of the police power of the state.²⁰² It has no application to proceedings to forfeit property in the abatement of a nuisance, such as the confiscation of intoxicating liquors and vehicles and other property used in connection with such liquor.²⁰³ The doctrine of corruption of blood was abolished in England in 1834, and is now scarcely known in the United States, although during and immediately after the Revolutionary War acts of attainder were passed by the legislatures of the several states.²⁰⁴

¹⁹⁹ Const. Art. III, § 3 cl. 2.

²⁰⁰ 1 Bouv. Law Dict. (8th Ed.) 278-279.

²⁰¹ Taswell-Langmead, English Constitutional History (8th Ed.) 105; 1 Bouv. Law Dict. (8th Ed.) 688.

²⁰² Woods v. Cottrell, 55 W. Va.

476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 335.

²⁰³ House & Lot v. State ex rel. Patterson, 204 Ala. 108, 85 So. 382, 10 A. L. R. 1589.

²⁰⁴ 1 Bouv. Law Dict. (8th Ed.) 279, 688.

CHAPTER 25

LAWS IMPAIRING THE OBLIGATION OF CONTRACTS

The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.

—Chief Justice Hughes

§ 314. **Constitutional Guaranty.** The stability of contracts in the United States was assured by the constitutional guaranty that “no state . . . shall pass any law impairing the obligation of contracts.”¹ This guaranty, unlike so many provisions of the Constitution, was not founded upon the common law but was included in the Constitution to meet a certain financial condition existing at the close of the Revolutionary War. There was a great apprehension that the states would repudiate their debts; that they might issue paper money and discharge their obligations in worthless currency; or that they would make unsound provision for the relief of the debtor class, thereby injuring the creditor class and impairing both public and private credit.² This clause is a limitation upon the powers of the states only.³

Neither this clause nor any other clause of the Constitution forbids Congress, in the exercise of the powers granted to it, from enacting laws which, in their operation, impair the obligations of contracts.⁴ But when the United States, with constitutional authority, makes contracts, it cannot directly or indirectly impair or repudiate them save that it cannot be sued on them without its

¹ Const. Art. I, § 10, cl. 1.

² See Chap. 2, § 20, *supra*. See also *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

³ *Murray v. Charleston*, 96 U. S. 444, 24 L. ed. 760; *Sturges v. Crowninshield*, 4 Wheat. 200, 4 L. ed. 550.

⁴ *Continental Illinois National*

Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. ed. 1110. See also *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240, 79 L. ed. 885, 95 A. L. R. 1352; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Re Prima Co. (C. C. A.)* 88 F. (2d) 785, 116 A. L. R. 766.

consent.⁵ "Speaking generally," observed Justice Sutherland, "it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."⁶ For example, Congress enacted the Bankruptcy Act of 1898 under which debtors may be discharged from their debts, even those existing at the time of the enactment of the law.⁷ The powers of the states in adopting insolvency or exemption laws, during the interim in which such laws were valid due to the nonexistence of a bankruptcy law, were limited to the discharge of subsequent debts only.⁸

§ 315. What Constitutes Impairment. The guaranty of the Constitution is directed against the impairment of the *obligation* of contracts rather than the contract itself. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. He is required by duty and by law to perform his undertaking and this is known as the obligation of his contract.⁹ "The obligation," observed Chief Justice Marshall, "is coeval with undertaking to perform."¹⁰ The remedy is the procedure of enforcing the contract in the courts in the event of default.¹¹ The obligation protected by this guaranty is not derived solely from the acts and stipulations of the parties. The laws existing at the time and place

⁵ Perry v. United States, 294 U. S. 330, 79 L. ed. 912, 95 A. L. R. 1335.

⁶ Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. ed. 1110.

⁷ Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. ed. 1110; Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 97 A. L. R. 1106; American United Mutual Life Ins. Co. v. Avon Park, 311 U. S. 138, 85 L. ed. 91, 136 A. L. R. 860; Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I.

& P. R. Co., 294 U. S. 648, 79 L. ed. 1110.

⁸ Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113; W. B. Worthen Co. v. Thomas, 292 U. S. 426, 78 L. ed. 1344, 93 A. L. R. 173.

⁹ Bank of Minden v. Clement, 256 U. S. 126, 65 L. ed. 857.

¹⁰ Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; National Surety Co. v. Architectural Decorating Co., 226 U. S. 276, 57 L. ed. 221.

¹¹ Sturges v. Crowninshield, 40 Wheat. 200, 4 L. ed. 550; Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 390, 78 L. ed. 413, 88 A. L. R. 1481.

of making the contract, and where it is to be performed; enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction and discharge but also those in relation to its enforcement.¹²

In recent years, this doctrine has been extended to include the reservation of the essential attributes of sovereign power. "Not only are the existing laws read into contracts in order to fix obligations as between the parties but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order," announced Chief Justice Hughes, in 1934, in a leading case holding constitutional a Minnesota emergency statute relating to the foreclosure of pre-existing mortgages. "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this court."¹³

A state law may be said to impair the obligation of a contract and is void¹⁴ (a) when it alters the terms of the contract by imposing new conditions;¹⁵ (b) when it enlarges or abridges the intention of the parties;¹⁶ (c) when it accelerates or postpones the time of performance;¹⁷ (d) when it materially lessens or diminishes the value of the contract;¹⁸ (e) when it renders the contract in-

¹² *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405, 4 L. R. A. 348, 10 Am. St. Rep. 266.

¹³ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U. S. 32, 84 L. ed. 1061. See also *Wood v. Lovett*, 313 U. S. 362, 85 L. ed. 1404.

¹⁴ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

¹⁵ *Columbia Railway, Gas & Electric Co. v. South Carolina*, 261 U. S. 236, 67 L. ed. 629; *Travelers Ins. Co. v. Marshall*, 124 Tex. 45,

76 S. W. (2d) 1007, 96 A. L. R. 802.

¹⁶ *Re Fidelity State Bank*, 35 Idaho 797, 209 Pac. 449, 31 A. L. R. 781.

¹⁷ *Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A. L. R. 802; *O'Connor v. Hartford Accident & Indemnity Co.*, 97 Conn. 8, 115 Atl. 484.

¹⁸ *Lapp v. Belvedere*, 116 N. J. L. 563, 184 Atl. 837, 115 A. L. R. 429; *Bank of Minden v. Clement*, 256 U. S. 126, 65 L. ed. 857; *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A. L. R. 836.

valid; ¹⁹ (f) when it substantially abridges or unreasonably delays the enforcement of a right created by the contract or interposes obstacles which would annul its performance ²⁰, but the legislature may enact statutes extending the period of redemption upon the sale of real estate; ²¹ (g) when it excuses one of the parties from performing it; ²² (h) when it precludes a recovery for a breach of the contract or deprives one of the parties from an important existing remedy. ²³

The degree of impairment is immaterial. Any law, which releases a part of the obligation, or any act, which to any extent or degree amounts to a material change, modifies it, and is repugnant to the constitutional prohibition. A provision of a state Constitution is a law within the prohibition of this guaranty and so is an agreement or contract between states. ²⁴

This prohibition is not an absolute one but prohibits unreasonable impairment only. Every case must be determined upon its own circumstances. In determining whether state legislation unconstitutionally impairs contract obligations, no unchanging yardstick can be fashioned, applicable at all times and under all circumstances, by which the validity of each statute may be measured and determined. ²⁵ "The question," asserted Justice Hughes, "is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." ²⁶

§ 316. What Contracts Are Protected. This guaranty protects all contracts of every description, executed as well as executory,

¹⁹ *Merchants Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

²⁰ *Lapp v. Belvedere*, 116 N. J. L. 563, 184 Atl. 837, 115 A. L. R. 429.

²¹ *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A. L. R. 836.

²² *State v. Krohmer*, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157.

²³ *Burrows v. Vanderbergh*, 69 Neb. 43, 95 N. W. 57.

²⁴ *Bank of Minden v. Clement*, 256 U. S. 126, 65 L. ed. 857; *Osh-*

kosh Waterworks Co. v. Oshkosh, 109 Wis. 208, 85 N. W. 376, 95 Am. St. Rep. 870; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 29 L. ed. 516; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547.

²⁵ *People by Van Schaiek v. Title & Mortgage Guarantee Co. of Buffalo*, 264 N. Y. 69, 190 N. E. 153, 96 A. L. R. 297.

²⁶ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

and express as well as implied,²⁷ which respect property, vested rights, or objects of value that confer rights which may be asserted in a court of justice.²⁸ In addition to the ordinary contracts between individuals,²⁹ it includes such instruments, involving reciprocal obligations of good faith as a grant by the United States to a state;³⁰ contracts between states;³¹ legislative grants and franchises;³² grants of franchises by municipal corporations;³³ contracts of municipal corporations;³⁴ judgments founded upon contract;³⁵ bonds and other pecuniary obligations of state or municipalities;³⁶ trust deeds;³⁷ and contracts establishing charitable trusts.³⁸ The contracts which the constitution protects are property rights, not governmental rights.³⁹

The guaranty does not extend to obligations not in the nature of contracts⁴⁰ or to contracts which are illegal, immoral or ultra vires.⁴¹ For example, the election and appointment of public officers and their acceptance of the office does not constitute a contract and the guaranty does not extend to such officers or to the

²⁷ *People v. Common Council of Buffalo*, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; *Stephen v. Southern Pac. R. Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17.

²⁸ *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Seton v. Hoyt*, 34 Ore. 266, 55 Pac. 967, 43 L. R. A. 634, 75 Am. St. Rep. 641.

²⁹ *Crane v. Hahlo*, 258 U. S. 142, 66 L. ed. 514.

³⁰ *McGee v. Mathis*, 4 Wall. 143, 18 L. ed. 314.

³¹ *Olin v. Kitzmiller*, 259 U. S. 260, 66 L. ed. 930.

³² *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590; *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed. 912, L. R. A. 1918 E 882, Ann. Cas. 1914 C 1282.

³³ *Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705.

³⁴ *Wilmington v. Bryan*, 141 N.

C. 666, 54 S. E. 543; *Omaha Water Co. v. Omaha*, 162 Fed. 225.

³⁵ *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 78 L. ed. 1344, 93 A. L. R. 173.

³⁶ *Hendrickson v. Apperson*, 245 U. S. 105, 62 L. ed. 178.

³⁷ *Coolidge v. Long*, 282 U. S. 582, 75 L. ed. 562.

³⁸ *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

³⁹ *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079. See also *Newton v. Commissioners*, 100 U. S. 548, 25 L. ed. 710.

⁴⁰ *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801.

⁴¹ *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553; *New Orleans v. New Orleans Water Works*, 142 U. S. 79, 35 L. ed. 943.

offices or to the salaries affixed to them.⁴² It does not extend to licenses or privileges as they are not contracts,⁴³ or to judgments not founded upon contract,⁴⁴ or to contracts relating to public property or statutes prescribing distinct remedies such as penalties and forfeitures.⁴⁵ It does not apply to contracts of marriage⁴⁶ and a charter of a municipal corporation is not a contract within the protection of this guaranty.⁴⁷

The guaranty does not include judicial decisions. No impairment of the obligation of a contract within the prohibition of the Federal Constitution can be effected by the judgment of a court.⁴⁸ "In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts," asserted Justice Gray, "not only must the obligation of contract have been impaired, but it must have been impaired by some act of the legislative power of the state and not by a decision of the judicial department only."⁴⁹ There is no vested right in reliance of the decisions of the courts as precedents.⁵⁰

§ 317. Limitations Upon Power of Legislature to Contract. A legislature is limited in its power to contract. It is not competent to relinquish any of the essential powers of government by an irrevocable bargain or grant. An existing legislature, therefore, cannot grant or bargain away or surrender the rights or powers of a

⁴² *Tanner v. Edwards*, 31 Utah 80, 86 Pac. 765, 10 Ann. Cas. 1091, 120 Am. St. Rep. 919; *Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606.

⁴³ *New Decatur v. American Telephone & Telegraph Co.*, 176 Ala. 492, 58 So. 613, Ann. Cas. 1915 A 875; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

⁴⁴ *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 36 L. ed. 925.

⁴⁵ *State v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 317.

⁴⁶ *Maynard v. Hill*, 125 U. S.

190, 31 L. ed. 654; *Fearon v. Treanor*, 272 N. Y. 268, 5 N. E. (2d) 815, 109 A. L. R. 1229; s. c., 273 N. Y. 528, 7 N. E. (2d) 677.

⁴⁷ *City of Pawhuska v. Pawhuska Oil & Gas Co.* 250 U. S. 394, 63 L. ed. 1054; *New Orleans v. New Orleans Water Works Co.* 142 U. S. 79, 35 L. ed. 943.

⁴⁸ *People's Banking Co. v. Sterling*, 300 U. S. 175, 81 L. ed. 586; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. ed. 382.

⁴⁹ *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 92.

⁵⁰ *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912 B 691.

subsequent legislature. Each legislature must have the power to govern in accordance with its own discretion within the scope of its general authority. All public grants are to be strictly construed and nothing passes by implication.⁵³ In announcing this doctrine in an early case, Chief Justice Taney asserted: "The object and end of all government is to promote the happiness and prosperity of the community by which it is established and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created . . . A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community has an interest in preserving it undiminished . . . While the rights of private property are safely guarded, we must not forget that the community also has rights and that the happiness and well being of every citizen depend upon their preservation."⁵⁴

It is well settled that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are invested in it for the promotion of the good of the public, though contracts previously entered into or grants previously made may be affected thereby.⁵⁵ A statute, therefore, enacted under the police power or the power of eminent domain, is not subject to the objection that it violates the obligation of prior legislative contracts or grants. The courts have held that such contracts will never be understood as involving a surrender of these powers. If they do, they are to that extent beyond legislative power and are void.⁵⁶

§ 318. Police Power—Eminent Domain. The police power is an exercise of a sovereign right of the government and is paramount to any existing contracts.⁵⁷ Any statute enacted in the lawful exercise of this power will be upheld by the courts even

⁵³ *Larson v. South Dakota*, 278 U. S. 429, 73 L. ed. 441.

⁵⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773. See also *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed. 912, L. R. A. 1918 E 882; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172, 13 L. ed. 92.

⁵⁵ *Manigault v. Springs*, 199 U.

S. 473, 50 L. ed. 274.

⁵⁶ *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274.

⁵⁷ *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274; *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U. S. 32, 84 L. ed. 1061. (The authority is not limited to health morals and safety. It extends to economic needs as well.)

though it may incidentally destroy existing contract rights.⁵⁸ This right is no less binding in the case of contracts than in the case of other property⁵⁹ and this applies both to contracts made with the state as well as contracts between individuals.⁶⁰ All contracts must be regarded as made subject to regulation under the police power and the future exercise of all other constitutional powers of the state.⁶¹ Familiar instances of the exercise of this power are where parties enter into contracts to sell liquor, operate a brewery or carry on a lottery. All of these contracts are subject to impairment by a change of policy on the part of the state.⁶² Other examples are railroad companies which, in spite of any contractual rights which they may have under their charters, are subject to regulation as to the construction, maintenance and operation of their roads.⁶³

Contract obligations are property, which may be taken under the power of eminent domain,⁶⁵ and two doctrines have been announced at different times by the courts in support of the established rule that the power of eminent domain is paramount to the constitutional guaranty against the impairment of the obligations of contracts.⁶⁶ The one is that the contract obligation is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized when it is appropriated as an existing enforceable contract. It is a taking and not an impairment of the obligation, and, if compensation be made, no constitutional rights are violated.⁶⁷

⁵⁸ *Semler v. Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086; *East New York Sav. Bank v. Hahn*, — U. S. —, 90 L. ed. —.

⁵⁹ *Calhoun v. Massie*, 253 U. S. 170, 64 L. ed. 843; *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162, 3 Ann. Cas. 86.

⁶⁰ *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 29 L. ed. 516.

⁶¹ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

⁶² *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274.

⁶³ *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 330.

⁶⁵ *Narragansett Electric Light Co. v. Sabre*, 50 R. I. 288, 146 Atl. 777, 66 A. L. R. 1553.

⁶⁶ *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. ed. 124.

⁶⁷ *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390, 56 L. ed. 481.

The other doctrine is that the power of eminent domain is so governmental in character that it is not subject to be restrained by the contract clause. To permit its interdiction would amount to a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.⁶⁸ This principle enters into every contract as an unwritten condition, whether it is between the state and an individual or between individuals only.⁶⁹

§ 319. Charters as Contracts. A charter may be defined as an instrument in writing from the sovereign power of a state, executed in due form, granting or guaranteeing rights, franchises or privileges.⁷⁰ The charter of a private corporation is a contract between the legislature granting it and the corporation; it cannot be materially modified, amended, altered or repealed by the legislature except with the consent or agreement of the corporation without violating the provision of the Constitution relating to the impairment of the obligations of contracts.⁷¹ All private corporations are included in this doctrine, including banks, public utilities and business and manufacturing corporations.⁷²

Charters, however, are generally granted by the legislature subject to its power to amend, alter or repeal them and, when this reservation is made, the legislature may exercise the power in every reasonable way. The reservation may be contained in the charter, or in a statute or general incorporation act or in the state constitution.⁷³ But rights or privileges granted to corporations by statute after their incorporation do not constitute a part of the charter or the contract created by it and these rights and privileges are not protected by the constitutional clause against impairment.⁷⁴ Ex-

⁶⁸ *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. ed. 124.

⁶⁹ *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390, 56 L. ed. 481.

⁷⁰ See 1 *Bouv. Law Dict.* (8th Ed.) 469.

⁷¹ *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

⁷² *Bank of Oxford v. Love*, 250 U. S. 603, 63 L. ed. 1165; *City of*

Independence v. Independence Waterworks Co., 153 Mo. App. 693, 135 S. W. 956.

⁷³ *Looker v. Maynard*, 179 U. S. 46, 45 L. ed. 79; *Sears v. City of Akron*, 246 U. S. 242, 62 L. ed. 688. For example, see *Constitution of North Dakota*, Art. I, § 20 and *Constitution of Montana*, Art. III, § 11.

⁷⁴ *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. ed. 937.

emptions from legislative control will be construed strictly against the corporation.⁷⁵

A distinction must be made between the essential functions and the ministrant functions of a state. Essential functions are those which the state performs in the exercise of its police power for the protection of the safety, health and morals of its people. These powers cannot be delegated or bargained away. Ministrant functions are those which include the providing of water, artificial light, transportation, education, sewage disposal, telephone and telegraph service and other services of a similar nature. These functions may be performed by the state or municipality or delegated by contracts to private individuals and corporations.⁷⁶

Two views exist as to the right of the states to fix tolls and charges of a public service corporation to which ministrant functions have been delegated. One view is to the effect that the state has no right to fix these charges unless the power to do so has been reserved⁷⁷ but even under this view the state is considered to have reserved the power unless an irrevocable grant to the corporation is established.⁷⁸ The other is that the state possesses the authority to fix rates and charges under the police power the same as it does in the case of essential functions, subject to the limitation that the charges must be reasonable and that the company must be allowed to conduct its business at a fair profit under the protection of the Fourteenth Amendment.⁷⁹

Charters of public institutions or subordinate agencies of the government are subject to the control of state legislatures or, if a federal agency, to Congress.⁸⁰ These charters are grants or delega-

⁷⁵ Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 32 L. ed. 377; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267.

⁷⁶ Louisiana Gas Light Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516; Grand Trunk & W. Ry. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L. R. A. (N. S.) 405; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 989; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

⁷⁷ Georgia Railway & Power Co. v. Town of Decatur, 262 U. S. 432, 67 L. ed. 1065.

⁷⁸ Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U. S. 231, 69 L. ed. 588.

⁷⁹ Southern Pac. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610; Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592.

⁸⁰ Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

tions of power to subordinate agencies of the government, rather than contracts, and all franchises, powers, rights and privileges are held subject to the amendment, alteration or modification by the legislature. For example, a state has power over the rights and property of cities, unrestricted by the contract, or even the due process clause of the Federal Constitution, and may revoke or amend its public powers or rights, or alter its boundaries or modify its form of government, or at any time may terminate its existence, as the city is purely the creature of the state.⁸¹

§ 320. Exemption from Taxation. The legislature of a state may, unless restrained by the state constitution, grant away the power of taxation for a consideration, either permanently or for a specified period.⁸² Such a grant is a contract within the provision of the Constitution forbidding the enactment of any law impairing the obligation of contracts.⁸³ Generally, such exemptions are contained in the charters of corporations but they may be granted by special acts such as municipal franchises or ordinances fixing licenses.⁸⁴ The grant must be founded upon a consideration and have the other requirements of a contract. A mere gratuity is not sufficient.⁸⁵ An exemption cannot be created by implication.⁸⁶ It must appear plainly, either from express words or the necessary intendment of the statute⁸⁷ and the burden is upon the person claiming the exemption clearly to establish his right to it.⁸⁸ An unconstitutional exemption is not a contract.⁸⁹

⁸¹ *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 29 A. L. R. 1471; *East Hartford v. Hartford*, 10 How. 511, 13 L. ed. 518; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552.

⁸² *Whiting v. Town of West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750.

⁸³ *Wright v. Central of Georgia R. Co.*, 236 U. S. 674, 59 L. ed. 781.

⁸⁴ *Powers v. Detroit*, G. H. & M. R., 201 U. S. 543, 50 L. ed. 860.

⁸⁵ *Grand Lodge of Masons v. New Orleans*, 166 U. S. 143, 41 L. ed. 951; *Wisconsin & Michigan Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229; *East Saginaw Salt Mfg.*

Co. v. East Saginaw, 13 Wall. 373. 20 L. ed. 611.

⁸⁶ *United States Trust Co. v. Helvering*, 307 U. S. 57, 83 L. ed. 1104; *Hogg v. Mackay*, 23 Ore. 339, 31 Pac. 779, 19 L. R. A. 77.

⁸⁷ *Wheelwright v. Trefry*, 235 Mass. 584, 127 N. E. 523, 37 A. L. R. 920; *United States Trust Co. v. Anderson (C. C. A.)* 65 F. (2d) 575, 89 A. L. R. 994; *Portland Terminal Co. v. Hinds*, 138 Me. 434, 187 Atl. 716, 108 A. L. R. 235.

⁸⁸ *Barnes v. Jones*, 139 Miss. 675, 103 So. 773, 43 A. L. R. 673.

⁸⁹ *State v. Guaranty Sav. Building & Loan Ass'n*, 225 Ala. 481, 144 So. 104, 86 A. L. R. 819. For

Generally, state constitutions provide that all corporate charters subsequently granted shall be subject to alteration, amendment or repeal and, under this reservation, the legislature is wholly without power to grant an irrevocable exemption from taxation⁹⁰ and the same reservation may be contained in a statute.⁹¹ In either case, a grant by the legislature would not constitute a contract.⁹² A grant of exemption from taxation will not include inheritance or succession taxes as these, strictly speaking, are not taxes at all but death duties levied as exactions of the state in the course of the settlement of estates as an incident to the devolution of title by force of its laws.⁹³

§ 321. Laws Affecting Remedies on Contracts. All laws relating to the remedies for the enforcement of contracts may be changed or modified by the legislature, and even repealed, but the changing or repealing statute must leave the parties a substantial remedy and cannot go so far as materially to affect vested rights.⁹⁴

"The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation but, in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right," asserted Justice Roberts. "The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for enforcement of the obligation remains or is substituted for the one taken away."⁹⁵⁻⁹⁶

The extent of the power of the legislatures to alter or modify remedies has been well defined by the courts. They may make changes in the rules of procedure, applicable to both past and

example, see Constitution of North Dakota, Art. I, § 20 and Constitution of Montana, Art. III, § 11.

⁹⁰ Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679.

⁹¹ Louisville v. Louisville Bank, 174 U. S. 439, 43 L. ed. 1039.

⁹² New York v. Cook, 148 U. S. 397, 37 L. ed. 498.

⁹³ Corbin v. Baldwin, 92 Conn. 99, 101 Atl. 834, Ann. Cas. 1918 E 932; Washington County Hospital Ass'n v. Mealey's Estate, 121 Md. 274, 88 Atl. 136, 48 L. R. A. (N. S.) 373, Ann. Cas. 1915 B 1050.

⁹⁴ Ettar v. Tacoma, 228 U. S. 148, 57 L. ed. 773; W. B. Worthen Co. ex rel. Board Com'rs Street Improvement Dist. No. 513 v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 97 A. L. R. 905.

⁹⁵⁻⁹⁶ Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U. S. 124, 81 L. ed. 552, 108 A. L. R. 886. See also Commissioners of Sinking Fund v. Philadelphia, 324 Pa. 129, 188 Atl. 314, 113 A. L. R. 202; Honeyman v. Jacobs, 306 U. S. 539, 83 L. ed. 972. See also Gelfert v. National City Bank of New York, 313 U. S.

future contracts.⁹⁷ They may alter the rules of evidence.⁹⁸ They may amend the laws relating to process,⁹⁹ to parties¹⁰⁰ and to provisional remedies.¹⁰¹ They may add new remedies.¹⁰² They may enact new and different statutes of limitation but the remedy of the creditor cannot be taken away entirely or unreasonably restricted.¹⁰³ They may even abolish courts and create new ones and may change and vary the times of holding courts¹⁰⁴ and shift the jurisdiction from one court to the other.¹⁰⁵ All these changes and alterations in the laws, however, must be within the limits defined by Justice Roberts.¹⁰⁶

This limitation was illustrated in the *Blaisdell* case, cited, *supra*, in which the Supreme Court held valid a Minnesota moratorium law postponing the sales of real estate in foreclosure proceedings and extending the periods of redemption,¹⁰⁷ Chief Justice Hughes declaring: "that this constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the state, in the exercise of its essential reserved powers, to protect the vital interests of the people."¹⁰⁸ Later, he limited the exercise of this power to emergency periods only.¹⁰⁹ In 1935, Justice Cardozo announced the limits more comprehensively when he said that "not even changes of the remedy may be pressed so far as to

221, 85 L. ed. 1299, 133 A. L. R. 1467.

⁹⁷ *People, ex rel. Durham Realty Co. v. LaFetra*, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152; *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602.

⁹⁸ *Marx v. Hawthorn*, 148 U. S. 172, 37 L. ed. 410.

⁹⁹ *Cairo & Fulton R. Co. v. Hecht*, 95 U. S. 168, 24 L. ed. 423.

¹⁰⁰ *People's Baking Co. v. Sterling*, 300 U. S. 175, 81 L. ed. 586.

¹⁰¹ *Cook v. Gray*, 2 Houst. (Del.) 455, 81 Am. Dec. 185.

¹⁰² *New Orleans & L. R. Co. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679; *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163, 78 L. ed. 243.

¹⁰³ *Story, Constitution*, § 1385;

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174.

¹⁰⁴ *Baltimore, & O. R. Co. v. Maughlin*, 153 Md. 367, 138 Atl. 334.

¹⁰⁵ *Scoley v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490.

¹⁰⁶ See note 91, *supra*.

¹⁰⁷ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

¹⁰⁸ *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

¹⁰⁹ *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 78 L. ed. 1344, 93 A. L. R. 173; *Treigle v. Acme Homestead Ass'n* 297 U. S. 189, 80 L. ed. 575.

cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected." ¹¹⁰

¹¹⁰ W. B. Worthen Co. ex rel. U. S. 56, 79 L. ed. 1298, 97 A. L.
Board Com'rs Street Improvement R. 905.
Dist. No. 513 v. Kavanaugh, 295

CHAPTER 26

RETROSPECTIVE LAWS

Retrospective laws are generally unjust; and neither accord with sound legislation nor with the fundamental principles of the social compact.

—Justice Story

§ 322. **Guaranty Limited—Definition.** There is no guaranty against retrospective laws in the Constitution of 1787 except the provision against the enactment of an ex post facto law, which is limited to actions of a criminal nature.¹ The mere fact that a statute is retroactive does not bring it in conflict with the Constitution.² Several states, however, have enacted statutes similar to the Missouri statute, which provides “that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be passed by the general assembly.”³

A retrospective law is one that operates on past acts, instruments or proceedings or upon rights already accrued, giving to them an effect different from that which attached to them before the law was enacted. The definition of Justice Story has become classic. “Every statute which takes away or impairs vested rights acquired under existing laws,” he said, “or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past, must be deemed retro-

¹ Const. Art. I, § 9, cl. 3. See Chap. 24, § 310, *supra*, Cummins v. Church, 50 R. I. 71, 145 Atl. 12; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876.

² Preston Co. v. Funkhouser, 261 N. Y. 140, 184 N. E. 737, 87 A. L. R. 459; Ambassador, Inc. v.

United States, 325 U. S. 317, 89 L. ed. 1637.

³ Constitution of Missouri, Art. II, § 15; Smith v. Direkx, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510. See also Constitution of Colorado, Art. I, § 11.

spective.”⁴ Retrospective laws are frequently spoken of as retro-active laws. The two terms are used synonymously.

Retrospective laws, in their general sense, include *ex post facto* laws and laws impairing the obligations of contracts but the term is most frequently used as applicable to civil laws only in order to distinguish them from *ex post facto* laws. As generally used, retrospective laws relate to substantial existing rights as distinguished from laws affecting remedies and procedure. The latter are not within the scope of the inhibition against retrospective laws, unless the remedy is entirely taken away or is incumbered with conditions which make it valueless.⁵

§ 323. Power to Enact—Construction. Subject to the limitations set forth in section 324 hereof, Congress and the various state legislatures may enact retrospective laws. They have authority to pass acts which may reach back and change or modify the effect of a prior transaction, provided no fundamental objection exists apart from the retrospective aspect.⁶ While these laws are generally deemed oppressive, they may be enacted for the purpose of curing defects in remedies, of confirming rights already existing or of adding to the means of securing and enforcing existing rights and remedies. The courts recognize that, in this respect, they operate for the benefit of society.⁷ If the constitutionality, however, of legislation having a retrospective aspect is questioned, the enactment will be carefully scrutinized because of the abuses which may result therefrom.⁸

The general rule of construction, however, is that statutes must be construed prospectively except where the legislative intent that they shall act retrospectively is so clear as to preclude all question

⁴ See 2 Story, Constitution, §§ 1398-1399, 1957-1958; Reed v. Swan, 133 Mo. 100, 34 S. W. 484; Smith v. Direkx, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510; Ellis v. Kroger Grocery & Baking Co., 159 Kan. 213, 152 P. (2d) 860, 156 A. L. R. 546.

⁵ Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 246 Pac. 1046, 46 A. L. R. 1095.

⁶ Prata Undertaking Co. v. State Board of Embalming, 55 R. I. 454, 182 Atl. 808, 104 A. L. R. 389.

⁷ Pritchard v. Savannah Street & Rural Resort R. Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721; Smith v. Direkx, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510.

⁸ Prata Undertaking Co. v. State Board of Embalming, 55 R. I. 454, 182 Atl. 808, 104 A. L. R. 389.

as to the intention of the legislature. Where a statute is a remedial one, a more liberal construction is favored but, even in such cases, if it may disturb vested rights, the court cannot construe the statute to act retrospectively unless there is some language in it indicating that such was the legislative intent.⁹ A statute which is not by its terms made to act retroactively will not be construed to do so where such an interpretation would render it unconstitutional.¹⁰

§ 324. **Limitations on Power.** The power of Congress and of the state legislatures to enact retrospective laws is subject to the following limitations:

- (a) They cannot be in the nature of bills of attainder or ex post facto laws.¹¹
- (b) They cannot impair the obligations of contracts.¹²
- (c) They cannot divest, impair or incumber the title to property or destroy or impair vested rights.¹³
- (d) They cannot deny due process of law.¹⁴
- (e) A state legislature cannot enact a retrospective law in violation of the provisions of the state constitution.¹⁵ But a state constitution, broadly prohibiting the passage of retroactive laws, will be so restricted as to apply only to enactments affecting or impairing vested rights.¹⁶

⁹ *Farmers Nat. Bank & Trust Co. v. Berks County Real Estate Co.*, 333 Pa. 390, 5 A. (2d) 94, 121 A. L. R. 905.

¹⁰ *Swab v. Doyle*, 258 U. S. 529, 66 L. ed. 747, 26 A. L. R. 1454.

¹¹ See Chap. 24, §§ 304-305, *supra*.

¹² See Chap. 25, *supra*.

¹³ *Bullard v. Holman*, 184 Ga. 788, 193 S. E. 586, 113 A. L. R. 763; *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N. E. (2d) 318, 124 A. L. R. 1472; *Central Sav. Bank v. New York*, 279 N. Y. 266, 18 N. E. (2d) 151, 280 N. Y. 9, 19 N. E. (2d) 659, 121 A. L. R. 607, 623; *Ellis v. Kroger*

Grocery & Baking Co., 159 Kan. 213, 152 P. (2d) 860, 155 A. L. R. 546.

¹⁴ See Chap. 22, *supra*. See also *League v. Texas*, 184 U. S. 156, 46 L. ed. 478; *Farmers Nat. Bank & Trust Co. v. Berks County Real Estate Co.*, 333 Pa. 390, 5 A. (2d) 94, 121 A. L. R. 905; *Truax v. Corrigan*, 257 U. S. 312 66 L. ed. 254, 27 A. L. R. 375; *State ex rel. Cleveringa v. Klein*, 63 N. D. 514, 24 N. W. 118, 86 A. L. R. 153.

¹⁵ *Smith v. Direkx*, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510.

¹⁶ *Bullard v. Holman*, 184 Ga. 788, 193 S. E. 586, 113 A. L. R. 763. See *Constitution of Georgia*, Art. I, § 2, par. 2.

- (f) The public policy of the state must yield to the Constitution of the United States. This restriction is apparent in the enactment of statutes relating to the police power. They are subject to the restrictions enumerated above and cannot be as extensive as if the state was an independent sovereign power.¹⁷

§ 325. **Repeal of Existing Laws.** The legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. The constitutional provisions, which prohibit the passage of laws impairing the obligation of contracts, cannot be construed to prohibit the exercise by the legislature of its constitutional powers.¹⁸ There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal and there can be no implied promise on the part of a state to protect its citizens against incidental injury occasioned by changes in the law. Every citizen, in reliance on the continued existence of the laws as they are, takes on himself the risk of their being changed.¹⁹

Likewise, there is no vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority.²⁰

There is this limitation, however, upon the repeal or amendment of a statute. It cannot have the effect of extinguishing rights which have been acquired or have become vested upon the law. For example, the legislature cannot take away one man's property and give it to another without due process of law.²¹

§ 326. **Remedial Legislation.** The state has complete control over the remedies it offers to suitors in its courts and these remedies may be made applicable to rights and remedies already in existence.

¹⁷ State ex rel. Cleveringa v. R. Co., 63 Vt. 169, 22 Atl. 76. Klein, 63 N. D. 514, 24 N. W. 118, 86 A. L. R. 153.

¹⁸ Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A. L. R. 853.

¹⁹ Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755.

²⁰ Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A. L. R. 853; Fitzgerald v. Grand Trunk

R. Co., 63 Vt. 169, 22 Atl. 76. 13 L. R. A. 70.
²¹ Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755; Arnold & Murdock Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A. L. R. 1470; Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 26 Am. St. Rep. 464, 13 L. R. A. 304.

A cause of action may be prescribed where none existed before and, in some instances, statutory actions and remedies may be substituted for previously existing rights and remedies at the common law.²² Actions at law and actions in equity may be replaced by a single statutory form of action, new rules of evidence may be established and all other laws affecting remedies and procedure only may be enacted.²³

There is no vested right in the forms and modes of procedure of our courts and other tribunals. Each succeeding legislature may establish a new or different procedure and the courts may construe a statute to provide one form of procedure and subsequently hold that it prescribes an entirely different form of procedure.²⁴ The remedies provided by the state do not constitute the part of any contract and cannot be regarded as being of the essence of any right which a party may seek to enforce. Every cause must be tried under the rules of procedure existing at the time of trial, even though they may have been changed since the action was instituted. For example, the statutory right to have causes reviewed on appeal may be altered, while the cause is on its way to the appellate tribunal.²⁵

There is this limitation. The remedy cannot be taken away entirely or incumbered with conditions, which amount to a denial of due process of law or the equal protection of the laws, or to the impairment of an existing contract, but a mere change in the rules of evidence, or even a change in the method of determination of rights, will not necessarily violate these constitutional guaranties. What is and what is not a violation of these guaranties depends upon the circumstances of each case.²⁶ All that is required is the preservation of a substantial procedure.²⁷

²² *Miller v. Letzerich*, 121 Tex. 248, 49 S. W. (2d) 404, 85 A. L. R. 451; *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165; *Ellis v. Kroger Grocery & Baking Co.*, 159 Kan. 213, 152 P. (2d) 860, 155 A. L. R. 546.

²³ *State ex rel. Cleveringa v. Klein*, 63 N. D. 514, 24 N. W. 118, 86 A. L. R. 153.

²⁴ *A. Backus, Jr. & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. ed. 853.

²⁵ *Spicer v. Benefit Ass'n of Railway Employees*, 142 Ore. 588,

21 P. (2d) 187, 90 A. L. R. 517; *Simpson v. Winegar*, 122 Ore. 297, 258 Pac. 562; *Warring v. Colpoys*, 74 App. D. C. 303, 122 F. (2d) 642, 136 A. L. R. 1025.

²⁶ *State ex rel. Cleveringa v. Klein*, 63 N. D. 514, 24 N. W. 118, 86 A. L. R. 153; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Mahood v. Bessemer Properties*, 154 Fla. 710, 18 So. (2d) 775, 153 A. L. R. 1199.

²⁷ *Gibbes v. Zimmerman*, 290 U. S. 326, 78 L. ed. 342.

§ 327. **Rights of Action and Defense.** Although there is no property right in any particular remedy, a vested right of action, whether it springs from the provisions of a contract or from the principles of the common law, is property in the same sense in which real estate, personal property or other tangible things are property and is equally protected against capricious or arbitrary interference. It is not competent, therefore, for the legislature to take such right of action away without providing some other efficient remedy in its place. It cannot enact any law which, in its operation, amounts to a denial or obstruction of the rights accruing from contracts or from the principles of the common law. For example, the legislature cannot destroy or diminish the value or amount of a judgment or destroy its effect as a lien. Nor can a city take away entirely from an injured person his remedy against its officers for their negligent acts or omissions.²⁸

A vested right to an existing material defense is also a property right and is equally protected. This protection, however, does not include defenses based on informalities which do not affect substantial rights or equities, or a defense not appertaining to the merits of the case. For example: The legislature cannot remove the bar of the Statute of Limitations which has become complete. It cannot revive an action affecting real or personal property, or an action to collect a debt.²⁹

§ 328. **Curative Statutes.** Curative statutes may be enacted to cure or validate errors or irregularities in legal proceedings, in ad-

²⁸ *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715; *State v. Hildebrand*, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; *Mattson v. Astoria*, 39 Ore. 577, 65 Pac. 1066, 87 Am. St. Rep. 687; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159.

²⁹ *Baltimore & O. S. W. Ry. Co. v. Read*, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293; *Magniar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182; *Robinson v. Robins Dry Dock & Repair Co.* 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310; *Mulligan v. Hilton*, 305 Mass. 5,

24 N. E. (2d) 676 133 A. L. R. 376, 384 (power of legislature to revive a right of action barred by limitation or to revive action which has been abated by lapse of time); *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 89 L. ed. 1628 (where the title to real or personal property has not become vested, a state legislature may repeal or extend a statute of limitations, even after the right of action is barred thereby, restore to the plaintiff his remedy and divest the defendant of his statutory bar).

ministrative proceedings and to cure or give effect to transactions between individuals.

- (a) Curative statutes may remedy defects in legal actions, which amount to irregularities and defects in procedure only. They cannot be used to supply the court with jurisdiction and they cannot affect substantive rights. They cannot constitutionally impose an obligation with respect to a transaction that at the time it took place gave rise to no obligation.³⁰
- (b) Defective executive or administrative action may be cured by a retroactive law, provided that the defect or omission does not amount to a denial of due process of law or the equal protection of the laws and is not jurisdictional. For example: Defective proceedings in the assessment and collection of taxes may be remedied. A void tax or other proceeding, however, cannot be validated.³¹
- (c) A legislature may validate transactions between private persons which failed because of some legal disability or irregularity. But a curative statute cannot impair vested rights, or transfer the title to property or interfere with the intervening rights of third persons. For example: The disability of minors or married women may be removed. A deed, invalid because of a defective acknowledgment, may be cured. But a deed of gift, void under the statute because of failure to register it in time, cannot be validated.³² As early as 1822, a marriage was validated, the Court saying, "Laws of a retroactive nature affecting the rights of individuals, not adverse to equitable principle and highly

³⁰ *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; *Mulligan v. Hilton*, 305 Mass. 5, 24 N. E. (2d) 676, 133 A. L. R. 376; *Lane v. Nelson*, 79 Pa. 407.

³¹ *McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561. See also *Binney v. Long*, 299 U. S. 280, 81 L. ed. 239; *United States v. Hudson*, 299 U. S. 498, 81 L. ed. 370; *Whitney v. State Tax Commission*, 309 U. S. 530, 84 L. ed. 909; *Welsh v. Henry*, 305 U. S. 134, 83 L. ed. 87, 118 A. L.

R. 1142; *People ex rel. Leaf v. Orvis*, 374 Ill. 536, 30 N. E. (2d) 23, 132 A. L. R. 1382, 1388.

³² *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Booth v. Haviston*, 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186; *Smoot v. People's Perpetual Loan & Building Ass'n*, 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589; *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129, 159 A. L. R. 380 (legislature without power to divest one person of title and to vest it in another).

promotive of the general good, have often been passed and as often approved." ³³

The rule frequently applied to these statutes may be stated generally as follows: If the irregularity consists in performing a certain act or in the manner of performing a certain act, which constitutes the defect in the proceedings and which the legislature might have made immaterial or unnecessary by a prior enactment, it has equal power to make the same immaterial or unnecessary by a subsequent enactment. If the thing or act omitted is something, the necessity for which the legislature might have dispensed with by a prior statute, then it is within the power of the legislature to dispense with it by a subsequent statute. ³⁴

³³ *Inhabitants of Goshen v. Inhabitants of Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

³⁴ See notes 30, 31, 32, *supra*.

PART VI

MAJOR STATE POWERS

CHAPTER 27

POLICE POWER

The limitations of the Constitution are not maxims of social wisdom but definite controls of legislative process.

—Justice Reed

§ 329. **Definition—Scope.** The police power is the plenary power inherent in every sovereign state (a) to prohibit all things hurtful to the comfort, safety, and welfare of society; (b) to prescribe regulations to promote the health, peace, morals, education and good order of the people; and (c) to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.¹

Speaking of the difficulty of defining the term and of its scope, Justice Chadwick of the Supreme Court of Washington, observed: "Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of the things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim *salus populi suprema lex*. It is not a rule, it is an evolution.

¹ *Prager v. W. H. Chapman & Sons Co.*, 122 W. Va. 428, 9 S. E. (2d) 880, 129 A. L. R. 1114; *People v. Weiner*, 271 Ill. 74, 110 N. E. 870, Ann. Cas. 1917 C 1065; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *Ex parte Rameriz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51; *State v. Old Tavern Farm*, 133 Me. 468, 180 Atl. 473, 101 A. L. R. 810; *State v. Klein*, 63 N. D. 514, 249 N. W. 118, 86 A. L. R. 1523.

. . . The power has always been as broad as the public welfare and as strong as the arm of the state. . . . The scope of the police power is to be measured by the legislative will of the people upon questions of public concern . . . (in statutes) enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, industrial and political development."²

§ 330. Development of Power. The development of the police power is an excellent example of the growth of constitutional power through judicial decisions. Theoretically the power was in the states prior to the adoption of the Constitution of the United States and remained in the states in the formation of the Constitution of 1787, and has not been taken away by any of the amendments. Neither the Federal nor the early state constitutions defined the term. The phrase was used by Chief Justice Marshall in 1827, and the doctrine grew rapidly during the period of a more liberal construction of state powers from 1830 to 1860 under Chief Justice Taney. It was discussed in the License cases in 1846 and upheld in the Slaughter House cases in 1873, and in the Granger cases in 1887.³

The police power is not confined within the narrow circumscription of precedents, resting upon past conditions. As our commonwealths develop politically, economically and socially, the police power likewise develops to meet the changed and changing conditions.⁴ "This becomes very apparent," remarked Justice Whiting of the Supreme Court of South Dakota, "when one contemplates the new and ever-changing social, economic and political conditions resultant from the physical, intellectual and moral evolution of the human race, which, as well as the peculiar conditions existent in a particular locality, may, from very necessity, call for continual changes in the exercise of this power. What was a reasonable exercise thereof in the days of our fathers, may today seem so utterly

² State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645.

³ People v. Weiner, 271 Ill. 74, 110 N. E. 870, Ann. Cas. 1917 C 1065; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; License Cases, 5 How. 583, 12 L. ed. 256;

Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Granger Cases, 94 U. S. 155-180, 24 L. ed. 94-99.

⁴ Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479.

unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify the same; what would by our fathers be rejected as unthinkable, is today accepted as the most proper and reasonable exercise thereof; and what would be a proper exercise thereof under conditions existing in one place would, at the very same time, be improper under conditions existing in another place. There is nothing known to the law that keeps more in step with human progress than does the exercise of this power; but, while this fact is evidenced to a certain degree by current legislative enactments, yet for the reasons above stated it is upon the courts that the people mainly rely for such recognition of changing conditions and such careful supervision over the exercise of this far-reaching and all-important power as will properly guard the rights both of the individuals and of the public."⁵

§ 331. Limitations of Power. Although the police power is very broad and far-reaching, it is not without its restrictions. While the courts will not pass upon the wisdom of an act concerning the exercise of this power, they will pass upon the question of whether such an act has a substantial relation to the power. "The court must be able to see," asserted Justice Carter of the Supreme Court of Illinois, "in order to hold that a statute or ordinance comes within the police power, that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended and that there is some connection between the provisions."⁶⁻⁷

The courts have announced that laws and regulations enacted under the police power are subject to certain specific regulations, among which the following are the most important: (a) These laws cannot violate any provision of the Constitution of the United States, including the Fourteenth Amendment.⁸ (b) They cannot

⁵ *Streich v. Board of Education*, 34 S. D. 169, 147 N. W. 779, Ann. Cas. 1917 A 760.

⁶⁻⁷ *Shephard v. City of New York*, 216 N. Y. 251, 110 N. E. 435, Ann. Cas. 1917 C 1062; *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

⁸ *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *State v. Old Tavern Farm*, 133 Me. 468, 180 Atl. 473, 101 A. L. R. 410; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, Ann. Cas. 1918 A 1201.

violate any provision of the state constitution.⁹ (c) They cannot interfere with the exclusive jurisdiction of Congress.¹⁰ (d) They must not unlawfully discriminate against individuals.¹¹ (e) They cannot unreasonably or unnecessarily invade or destroy private rights of liberty or property.¹² (f) They must not override the demands of natural justice.¹³ (g) They must actually relate to some one or more of the objects for the preservation of which this power may be exercised; the purpose to serve must be public and the means adopted must be reasonably adapted to accomplish that end.¹⁴ (h) They must be directed against a real evil, actual or threatened.¹⁵ (i) They must operate upon the public as a whole.¹⁶ If any doubt exists as to the extent of the power attempted to be exercised by the legislative authority out of the usual range, or which may affect the common-law right of a citizen, it is to be resolved against such authority.¹⁷

§ 332. Reasonableness of Regulation. Every exercise of the police power must withstand the test of reasonableness. The validity of every regulation must depend upon whether, under all existing circumstances, the regulation is reasonable or arbitrary, and whether it is really designed to accomplish a lawful public

⁹ *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50, 38 A. L. R. 1455; *State v. Old Tavern Farm*, 133 Me. 468, 180 Atl. 473, 101 A. L. R. 410; *Traveler's Ins. Co. v. Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A. L. R. 802.

¹⁰ *State ex rel. Wilkinson v. Murphy*, 237 Ala. 332, 186 So. 487, 121 A. L. R. 283; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, Ann. Cas. 1918 A 1201; *Re Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560.

¹¹ *Brown v. Seattle*, 150 Wash. 203, 272 Pac. 517, 278 Pac. 1072.

¹² *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658; *Prager v. W. H. Chapman & Sons Co.*, 122 W. Va. 428, 9 S. E. (2d) 880, 129 A. L. R. 1114; *Woolf v. Fuller*, 87 N. H. 64, 174 Atl. 193, 94 A. L. R. 1067.

¹³ *People v. Chicago, M. & St. P. R. Co.*, 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610.

¹⁴ *State v. Old Tavern Farm*, 133 Me. 468, 180 Atl. 473, 101 A. L. R. 410; *Treigle v. Acme Homestead Ass'n*, 297 U. S. 189, 80 L. ed. 575, 101 A. L. R. 1284.

¹⁵ *McDermott v. State*, 197 Wash. 79, 84 P. (2d) 372; *Aetna Fire Ins. Co. v. Jones*, 78 S. C. 445, 59 S. E. 148, 125 Am. St. Rep. 818.

¹⁶ *State ex rel. Wilkinson v. Murphy*, 237 Ala. 332, 186 So. 487, 121 A. L. R. 283.

¹⁷ *Miami Beach v. Texas Company*, 141 Fla. 616, 194 So. 368, 128 A. L. R. 350; *Anderson v. Shackelford*, 74 Fla. 36, 76 So. 343, L. R. A. 1918 A 139.

purpose.¹⁸ By reasonableness is meant that the regulation must be necessary and appropriate for the accomplishment of some object within the scope of the police power.¹⁹ It must not be oppressive. It must be enacted in good faith for the promotion of the public good and not for the annoyance or subjection of a particular class or race.²⁰ It cannot arbitrarily interfere with the enjoyment of personal or property rights guaranteed by the Constitution.²¹ It cannot take the property of one man and give it to another.²² Legislatures under the guise of the police power cannot impose restrictions that are unnecessary upon the use of private property or the pursuit of useful activities.²³ The courts will annul any regulation or statute which is unreasonable or illegal.²⁴

§ 333. Where Power Vested. Except for the power similar to the police power exercised by the Federal government in the sphere of its operations, the police power is vested in the states. It has always belonged to them.²⁵ "Such a power in the state, generally referred to as the police power, is not granted by or derived from the Federal Constitution," asserted Justice Harlan, "but exists independently of it, by reason of it never having been surrendered by the state to the general government; that among the powers of the state not surrendered—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, the public health, as well as to pro-

¹⁸ *Chicago, B. & Q. Ry. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 50 L. ed. 596; *Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 30 N. E. (2d) 269, 131 A. L. R. 1254; *McDougall v. Lueder*, 389 Ill. 141, 58 N. E. (2d) 899, 156 A. L. R. 1059.

¹⁹ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101.

²⁰ *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, Ann. Cas. 1918 A 1201; *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 4 L. R. A. 432.

²¹ *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. (2d) 67, 128 A. L. R. 1120; *Weaver v. Palmer Bros. Co.* 270 U. S. 402, 70 L. ed. 654;

Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 67 L. ed. 1103, 27 A. L. R. 1280.

²² *Knauer v. Louisville*, 20 Ky. L. Rep. 193, 45 S. W. 510, 41 L. R. A. 219.

²³ *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658; *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210, 86 A. L. R. 654.

²⁴ *State v. Sheridan*, 25 Wyo. 347, 170 Pac. 1, 1 A. L. R. 955.

²⁵ *Brewer v. Valk*, 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237; *Hammer v. Dagenhart*, 247 U. S.

mote the public convenience and the common good."²⁶ The power is inherent.²⁷

This power cannot be taken from the states and it cannot be exercised under any legislation of Congress. "Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states," asserted Chief Justice Dubois of the Supreme Court of Rhode Island. "All that the federal authority can do is to see that the states do not, under the cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizens of rights guaranteed by the Federal Constitution."²⁸

States have generally delegated the power to municipalities, and these corporations may exercise it so long as the state does not assert its sovereignty. When it does, the power of the municipality must give way to the general state law. If, however, the state has, by its inaction, permitted a municipality to assume and exercise its police power, the municipality is not foreclosed of the right, if the legislature by a general law sees fit to exercise it, unless the state has expressly withdrawn the right from the municipality.²⁹

§ 334. Power Inalienable. The legislative branch of the government cannot surrender its authority to enact laws for the enforcement of the police power to any individual or corporation. "In the performance of their duty of legislating for the public welfare, each successive body must from necessity, be left untrammelled except by the restraints of the fundamental law," asserted Justice Greene of the Supreme Court of Kansas. "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in nature, and they are to be dealt with as special exigencies of the moment require. Government is organized with a

251, 62 L. ed. 1101, Ann. Cas. 1918 E 724, 3 A. L. R. 649; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 3 Ann. Cas. 1133.

²⁶ House v. Mayes, 219 U. S. 270, 55 L. ed. 213. See also Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 16 Ann. Cas. 1066.

²⁷ Brewer v. Valk, 204 N. C. 186,

167 S. E. 638, 87 A. L. R. 237.

²⁸ State v. Kofines, 33 R. I. 211, 80 Atl. 432, Ann. Cas. 1913 C 1120.

²⁹ State ex rel. Webster v. Superior Court, King County, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D 78; People v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A. L. R. 1044.

view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." The same rule applies to a municipality.³³

§ 335. **Province of Legislature—Court Review.** The legislature is vested with a wide discretion in the exercise of the police power. This discretion includes the power not only to determine what the public interest requires, but also to adopt measures necessary for such protection. The wisdom, necessity and expediency of a statute are questions within the province of the legislature alone. "If the legislature proceeds regularly and violates no constitutional restriction, and a state of facts can reasonably be presumed to exist which would justify the legislation," announced Justice Holcomb of the Supreme Court of Washington in holding valid as a reasonable police regulation a law requiring a licensed barber to post his photograph in a conspicuous place, "the court will presume that it did exist, and that the law was enacted for that reason. If, however, no such state of facts could exist to justify the statute, then it may be declared void because it transcends the constitutional limits of legislative power."³⁴

The courts will not inquire into the motives of the legislature nor pass upon matters of legislative judgment.³⁵ The exercise of this discretion is not subject to judicial review so long as a statute has a substantial relation to the public welfare, does not violate the constitutional guaranties, and appears to be a reasonable exercise of the police power in relation to the purpose involved.³⁶

The police power, however, is subordinate to the organic law, and the power rests with the courts to determine whether the legislative action conflicts with this law. Determination by the legislature of what constitutes proper exercise of the power is not final and con-

³³ Board of Education v. Phillips, 67 Kan. 549, 73 Pac. 97, 100 Am. St. Rep. 475. See also State v. Olson, 185 Wash. 143, 53 P. (2d) 615, 111 A. L. R. 998; Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

³⁴ McDermott v. State, 197 Wash. 79, 84 P. (2d) 372.

³⁵ People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A. L. R. 613.

³⁶ State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A. L. R. 1336; McDermott v. State, 197 Wash. 79, 84 P. (2d) 372; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1440.

clusive, but is subject to supervision by the courts.³⁷ The courts must in each case decide whether in fact the public interests justify the attempted restriction by the state upon the liberties of its citizens. If they do not, it is the duty of the courts to declare the enactment, or regulation void, but such an enactment must be unmistakably and palpably in excess of legislative power to warrant judicial interference.³⁸

§ 336. **Public Peace and Order.** The maintenance of public peace and order is a lawful exercise of the police power.³⁹ Under this power, the liberty of every citizen may be curbed for the common good. This restraint does not mean arbitrary commands, but reasonable rules for the protection of the community.⁴⁰ For example: The state may prohibit the unlawful use of the flag.⁴¹ It may prohibit the publication of disloyal, scurrilous or abusive matter about our form of government.⁴² It may punish criminal syndicalism.⁴³ It may regulate the use of firearms.⁴⁴ It may prohibit the malicious use of property resulting in injury to others.⁴⁵ It may forbid the defamation of the memory of our national heroes.⁴⁶

"Constitutional freedom means liberty regulated by law," affirmed Chief Justice Rugg of the Supreme Court of Massachusetts,

³⁷ *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50, 38 A. L. R. 1455; *Chicago v. Kautz*, 313 Ill. 196, 144 N. E. 805, 35 A. L. R. 1050.

³⁸ *Prata Undertaking Co. v. State Board of Embalming*, 55 R. I. 454, 182 Atl. 808, 104 A. L. R. 389; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315.

³⁹ *Commonwealth v. Karvonen*, 219 Mass. 30, 106 N. E. 556, Ann. Cas. 1916 D 846.

⁴⁰ *Waugh v. University of Mississippi*, 237 U. S. 589, 59 L. ed. 1131; *Wright v. Board of Education*, 295 Mo. 466, 246 S. W. 43, 27 A. L. R. 1061 (prohibition of fraternities); *Myers v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446 (forbidding teaching of foreign language in school); *Pierce v. Society of Sisters*, 268 U. S. 510,

69 L. ed. 1070, 39 A. L. R. 468, 477 (school attendance and curriculum).

⁴¹ *Halter v. State*, 74 Neb. 757, 105 N. W. 298, 121 Am. St. Rep. 754, 7 L. R. A. (N. S.) 1079.

⁴² *State v. Simchuk*, 96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515.

⁴³ *Minnesota v. Moilen*, 140 Minn. 112, 167 N. W. 345, 1 A. L. R. 331.

⁴⁴ *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812; *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539.

⁴⁵ *Hornsby v. Smith*, 191 Ga. 491, 13 S. E. (2d) 20, 133 A. L. R. 684; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385.

⁴⁶ *State v. Haffer*, 94 Wash. 136, 162 Pac. 45, L. R. A. 1917 C 610.

in holding valid a statute prohibiting the carrying of a red and black flag with an inscription against organized government, sacrilegious, or derogatory to good morals. "Personal rights may be curbed in a rational way for the common good. Liberty is immunity from arbitrary commands and capricious prohibitions, but not the absence of reasonable rules for the protection of the community." ⁴⁷

It is the duty of a state or a municipal corporation to maintain peace and order, and the Supreme Court has held valid a state statute indemnifying the owners of property for damages occasioned by mobs and violence. ^{47a}

§ 337. Public Health and Safety. The protection of the public health and regulations in the interest of public safety are proper and important exercises of the police power. The protection of the public health includes laws regulating infectious diseases, vaccination, sterilization, drainage and sewer systems, overcrowded tenements, rent control, milk inspection, inspection and quarantine of livestock, and many other regulations affecting human beings, domestic livestock and other animals. ⁴⁸ The protection of public safety includes the inspection of motor vehicles, the regulation of their speed and sale, the regulation of the use of explosives, regulation of storage of gasoline, and in fact the regulation of any agency that may threaten or endanger the public. ⁴⁹ "An act which deprives a citizen of his liberty or property rights cannot be sustained under the police power unless a due regard for the public health, safety or welfare requires it," announced Justice Jones of the Supreme Court of Illinois. "In the exercise of this power the legislature may enact laws regulating, restraining or prohibiting

⁴⁷ *Commonwealth v. Karvonen*, 219 Mass. 30, 106 N. E. 556, Ann. Cas. 1916 D 846; *Commonwealth v. Libbey*, 216 Mass. 356, 103 N. E. 923, 49 L. R. A. (N. S.) 879.

^{47a} *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215.

⁴⁸ *Hacker v. Barnes*, 166 Wash. 558, 7 P. (2d) 607, 80 A. L. R. 1212; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223; *Rasmussen v. Idaho*, 181 U. S. 198, 45 L. ed. 820; *Buck v. Bell*, 274 U. S. 200, 71 L. ed. 1000; *New York,*

ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305; *Block v. Hirsch*, 256 U. S. 135, 65 L. ed. 685; *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 68 L. ed. 841.

⁴⁹ *Evanston v. Wazan*, 364 Ill. 198, 4 N. E. (2d) 78, 106 A. L. R. 789; *Miller v. Clark*, 47 R. I. 13, 129 Atl. 606, 42 A. L. R. 1204; *Miami Beach v. Texas Co.*, 141 Fla. 616, 194 So. 368, 128 A. L. R. 350; *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729.

anything harmful to the welfare of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual."⁵⁰

Although a state may enact sanitary laws and reasonable inspection regulations and may prevent persons suffering from contagious and infectious diseases from entering the state, it cannot interfere with transportation into or through its borders, beyond what is absolutely necessary for self-protection,⁵¹ and it cannot prohibit the introduction within its borders of articles of commerce which in their pure state are healthful, simply because such article in the course of its manufacture may be adulterated by dishonest manufacturers.⁵²

§ 338. Public Morals. Under the police power the state may enact laws to promote and protect the public morals. The phrase "public morals" is given a broad interpretation. It includes any practices which may tend to weaken or corrupt morals, prevent vicious practices, engender vice, indecency or social corruption or encourage idleness or vagrancy. Examples of subjects forbidden or regulated are saloons and sale of liquor, vagrancy, dance halls, prostitution, horse racing, bookmaking, trading stamps, sales of stock upon margin, and pool halls.⁵³ "The police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion," declared Justice Rose of the Supreme Court of Nebraska. ". . . Persons or members of any organization or society committing such offenses are amenable to the law and subject to prosecution and punishment."⁵⁴ Healthful and harmless games, such as golf, baseball, football and tennis, are not subject to regulation.⁵⁵

⁵⁰ *Evanston v. Wazau*, 364 Ill. 198, 4 N. E. (2d) 78, 106 A. L. R. 789; *United States v. Doremus*, 249 U. S. 86, 63 L. ed. 493.

⁵¹ *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Patapasco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191.

⁵² *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49.

⁵³ *State v. Harlowe*, 174 Wash.

227, 24 P. (2d) 601; *Bland v. People*, 32 Colo. 319, 76 Pac. 359, 105 Am. St. Rep. 80; *State v. Thompson*, 160 Mo. 333, 60 S. W. 1077, 83 Am. St. Rep. 468; *State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124.

⁵⁴ *Dill v. Hamilton*, 137 Neb. 723, 291 N. W. 62, 129 A. L. R. 743.

⁵⁵ *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, L. R. A. 1917 E 314.

§ 339. Prevention of Fraud. The police power extends to prevention and regulation of fraud and dishonesty, as well as the adoption of provisions for public financial safety. The power is very broad affecting many transactions common to everyday life. It includes the regulation of small loan companies, employment agencies, pawnshops, auctions, weights and measures, size of loaves of bread, butter substitutes and many other transactions in which charlatans, imposters, and overreaching and dishonest individuals might prey upon or cheat the public. The power has been extended to cover the validity of a statute relieving an automobile host from liability for unintentional injuries to a gratuitous guest.⁵⁶

In holding valid a law enacted for the protection of the purchaser or lessee of lots in a subdivision, Justice Langdon of the Supreme Court of California, declared: "The police power may be, and usually is, exercised for the purpose of protecting particular classes of the public in need of such protection, and it is rare indeed that a single law includes every one in the scope of its regulations. The object of the present law, prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses, is obviously legitimate. . . . The decisions sustaining regulatory legislation to prevent fraud are numerous, and they fully support the law herein attacked."⁵⁷

§ 340. Promotion of General Welfare. The police power has grown to include the promotion and protection of the public welfare. What is included within the definition of the phrases "general welfare" and "public welfare" rests largely in the discretion of the legislature. This body has the power to determine not only what the interest of public convenience and welfare require, but what measures are necessary to secure such interests. Even esthetic considerations may be regarded with other recognized considerations in the exercise of the power, and motor vehicle junk

⁵⁶ *Holsman v. Thomas*, 112 Ohio St. 397, 147 N. E. 750, 39 A. L. R. 760; *Shea v. Olson*, 135 Wash. 143, 53 P. (2d) 615, 111 A. L. R. 998; *State v. Buck Mercantile Co.*, 38 Wyo. 47, 264 Pac. 1023, 57 A. L. R. 675; *National Fertilizer Ass'n v. Bradley*, 301 U. S. 178, 81 L. ed. 990; *Peterson Baking Co. v. Bryan*,

290 U. S. 570, 78 L. ed. 505, 90 A. L. R. 1285; *People v. Freeman*, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; *Olsen v. Nebraska*, 313 U. S. 236, 85 L. ed. 1305.

⁵⁷ *Re Siderbotham*, 12 Cal. (2d) 434, 85 P. (2d) 453, 122 A. L. R. 496.

yards may be subjected to regulations and restrictions. The legislature must, however, keep in mind always the good of the citizens as a whole. The power cannot be exercised for private purposes or for the exclusive benefit of particular individuals or classes. It cannot be used as a cloak for the invasion of personal rights or private property, but the exercise of the power must be considered in the light of current economic conditions.⁵⁸

The public welfare includes a variety of interests calling for public care and control. In general, they are the social interests of safety, order and morals; the economic interests of general prosperity; public convenience; public needs; and nonmaterial and political interests.⁵⁹

§ 341. **Conservation of Natural Resources.** Under the police power, the authority of the state has been held to extend to regulations designed to increase the industries of the state, develop its resources and add to its wealth or to promote the public convenience and general prosperity. Under this authority, the state may prevent the exploitation and waste of natural resources, and it may protect, conserve and replenish these resources. The exercise of this power is necessary in order that the legislature may enact laws to promote the general welfare and to provide for the comfort and happiness of the people of the state. Natural resources include such resources as natural gas, oil, standing timber, coal and gravel. The power has been exercised in connection with the enhancement of land values, the breeding and trapping of fur bearing animals, the preservation of forests and the restocking of streams and forests with fish and wild animals.⁶⁰

⁵⁸ State v. Kievman, 116 Conn. 458, 165 Atl. 601, 88 A. L. R. 962; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703.

⁵⁹ Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P. (2d) 1083; State v. Van Vlack, 101 Wash. 503, 172 Pac. 563, L. R. A. 1918 E 108; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703; Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal. (2d) 634, 82 P. (2d) 3, 118 A. L. R. 486; State v.

Kartus, 230 Ala. 352, 162 So. 533, 101 A. L. R. 1336; State v. Sherman, 18 Wyo. 169, 105 Pac. 299, Ann. Cas. 1912 C 819; Commonwealth v. Zasloff, 338 Pa. 457, 13 A. (2d) 67, 128 A. L. R. 1120 (prohibiting sales below cost); Murphy, Inc. v. Westport, 133 Conn. 292, 40 A. (2d) 177, 156 A. L. R. 568.

⁶⁰ Krenz v. Nichols, 197 Wis. 394, 222 N. W. 300, 62 A. L. R. 466; State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; Bandini Petroleum Co. v. Superior

§ 342. Public Utilities—Railways—Foreign Corporations.

Public utilities are subject to regulation under the police power. The reason for this regulation is that the business is affected with a public interest. This includes the power of the state to fix the prices and charges for service. It includes electric light and gas companies, common carriers and the rates to be charged the public. It will permit only such rates to be charged by public utilities as will yield a fair and reasonable net profit on the value of the property which is used in the public service at the time the rate is fixed. If the rates established will not admit the earning of such compensation it will amount to the depriving of the public utility of its property without due process of law and to denying it of the equal protection of the laws under the provisions of the Fourteenth Amendment. The power to regulate does not include the power to destroy.⁶¹

It includes the power to regulate railways, buses and other modes of transportation. The regulation may include the speed of the vehicles, the building of bridges, the building of side tracks, construction of grade crossings, etc. It also includes the maintenance of a watchman at a crossing, the formation of mixed trains of baggage, freight cars and passenger coaches, of requiring automobiles to have electric lights, and the publication of tariffs and rates. These regulations, however, may not be carried to such an extent as to reduce the revenue of the company below a fair return or to confiscate the property of the company.⁶²

The police power also includes the right to exclude a foreign corporation from doing business in the state or from holding

Court, 284 U. S. 8, 76 L. ed. 136, 78 A. L. R. 826; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878; *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 933, 24 A. L. R. 294.

⁶¹ *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 186; *State ex rel. City of Gadsden v. Alabama City, G. & A. R. Co.*, 172 Ala. 125, 55 So. 176, Ann. Cas. 1913 D 696; *Indianapolis v. Nairn*, 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861,

Ann. Cas. 1913 D 78; *Chicago, M. & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

⁶² *Alton R. Co. v. Illinois Commerce Commission*, 305 U. S. 548, 83 L. ed. 344; *Chicago v. New York, C. & St. L. R. Co. (C. C. A.)* 216 Fed. 735; *Georgia Power Co. v. City of Decatur*, 281 U. S. 505, 74 L. ed. 999; *Stanley v. Public Utilities Commission*, 295 U. S. 76, 79 L. ed. 1311; *Lakeshore & M. S. R. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 43 L. ed. 702; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312; *Chicago & N. W. R. Co. v. Ochs*, 249 U. S.

property within its limits. It may limit the nature of the business which the corporation may conduct after entry. It may impose upon the corporation burdens greater than those imposed at the time of its entry, and it may later exclude the corporation from doing any business whatsoever within the state. The granting of a foreign corporation of general authority or permission to carry on business in a state does not give rise to any contract rights which the corporation can assert against the state.^{62a}

§ 343. Regulation of Skilled Trades, Professions and Businesses. Professions, trades and businesses may be regulated under the police power. "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country," declared Justice Peckham, "and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are necessarily, and in a manner wholly arbitrary, interfered with or destroyed, they do not extend beyond the power of the state to pass, and they form no subject for interference."⁶³

All occupations which may in any way affect the health, peace or morals are generally under close surveillance. Trades such as carried on by a barber, plumber, auctioneer, chiropodist, chiropractor, or undertaker are regulated through licenses in the interest of public health. The major professions of law, medicine and dentistry are regulated by long courses of study and preliminary training before admission to practice may be secured.⁶⁴ To these may be added such businesses as liquor storekeepers, pool hall operators, small loan companies, building and loan associations and

416, 63 L. ed. 679; *Norfolk & W. R. Co. v. Public Service Commission*, 265 U. S. 70, 68 L. ed. 904; *Smith v. Ames*, 169 U. S. 466, 42 L. ed. 819.

^{62a} *Asbury Hospital v. Cass County*, — U. S. —, 90 L. ed. —.

⁶³ *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725. See also *Williams v. Arkansas*, 217 U. S. 79,

54 L. ed. 673, 18 Ann. Cas. 865; *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 38 N. E. (2d) 70, 137 A. L. R. 1058.

⁶⁴ *McDermott v. State*, 197 Wash. 79, 84 P. (2d) 372; *State v. Smith*, 43 Ariz. 131, 29 P. (2d) 718, 92 A. L. R. 168; *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139, 100 A. L. R.

dry cleaning and dyeing.⁶⁵ But regulation may not go so far as to regulate the vocation of laying cement sidewalks or the manufacture and sale of ice.⁶⁶

Whenever a business is inimical to public welfare or to the health, safety, morals, or peace of the community, the legislature may prohibit the operation of such a business, or may regulate or discourage it through the imposition of fees or taxes.⁶⁷ The ground for prohibition or discouragement, however, cannot be merely fanciful. It cannot be so unreasonable and arbitrary as to deprive the owner of his property without due process of law.⁶⁸

§ 344. Relationship of Employer and Employee. The relationship of employer and employee is subject to police regulation.⁶⁹ This regulation is concerned chiefly with the safety and with the economic protection of the employee, the protection of the union and the right to strike in the settlement of disputes between the employer and employees. The employer is required to furnish the employee with a safe place to work.⁷⁰ The state may enact legislation concerning hours, wages and working conditions, and it may require the employer to contribute to the relief of the unemployed.⁷¹

Many states have enacted laws similar in effect to the National Labor Relations Act, protecting employees from interference in choosing representatives for bargaining with the employer,⁷² but

226; *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 38 N. E. (2d) 70, 137 A. L. R. 1058.

⁶⁵ *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 18 Ann. Cas. 865; *McCandless v. State*, —Tenn. —, 181 S. W. (2d) 154, 153 A. L. R. 832.

⁶⁶ *State ex rel. Sampson, v. Sheridan*, 25 Wyo. 347, 170 Pac. 1, 1 A. L. R. 955; *New State Ice Co. v. Liebmann*, 285 U. S. 262, 76 L. ed. 747.

⁶⁷ *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. ed. 1193, 112 A. L. R. 293.

⁶⁸ *State ex rel. Sampson v. Sheridan*, 25 Wyo. 347, 170 Pac. 1, 1 A. L. R. 955.

⁶⁹ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330; *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103.

⁷⁰ *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582.

⁷¹ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330; *Bunting v. Oregon*, 243 U. S. 426, 61 L. ed. 830.

⁷² 29 USC 151 et seq.

the courts have held that the state cannot dictate the terms of an employment contract against the will of the employer and employees in a private business such as the meat packing industry. To do this would deprive the parties of their guaranteed rights of liberty and property. The employer enjoys the normal right to employ and discharge employees, and the employee, on the other hand, has the right to accept or refuse employment or to resign.⁷³ But the refusal of an employer to hire an applicant for employment solely because of his affiliation with a labor union, or to discharge an employee because of such affiliation, has been held to be unfair labor practice under the National Labor Relations Act.⁷⁴ Labor unions are lawful organizations and are sanctioned and recognized by the courts in the use of all peaceful and legal measures for the accomplishment of their aims and are, therefore, not forbidden by the police power.⁷⁵

The state may regulate the right to strike. Although employees may leave their employment for any reason they may see fit, they may not combine to bring pressure upon the employer to prevent their places from being filled by others, unless the end sought to be obtained is a lawful one.⁷⁶ In holding a strike to enforce a stale claim to be illegal, Justice Brandeis declared: "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. . . . A strike may be illegal because of its purpose, however orderly the manner in which it is conducted."⁷⁷ Neither the common law nor the Fourteenth Amendment confers the absolute right to strike.⁷⁸ The various particular purposes which have been held subject to an orderly lawful strike include advancement or maintenance of wages, payment of wages during working hours, hours of labor, amount of work required, enforcement of contract rights, requiring the arbitration of disputes, the enforcement of negotiations, the right to do certain work, limiting the number of apprentices and compelling the use of the union label. The purposes which

⁷³ Charles Wolff Packing Co v. Board of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103. See also 267 U. S. 552, 69 L. ed. 785.

⁷⁴ Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. ed. 1271, 133 A. L. R. 1217.

⁷⁵ National Labor Relations

Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352.

⁷⁶ *Dorchy v. Kansas*, 272 U. S. 306, 71 L. ed. 248.

⁷⁷ *Dorchy v. Kansas*, 272 U. S. 306, 71 L. ed. 248.

⁷⁸ *Dorchy v. Kansas*, 272 U. S. 306, 71 L. ed. 248.

have been declared illegal are such as those to compel the employer to abandon the use of labor saving machinery, to procure a breach of contract, to compel the employer to charge a certain minimum price for his products, to compel the payment of a disputed claim, and for political purposes.⁷⁹ The courts have also held that sit down strikes are illegal.⁸⁰

Picketing is legal, and the Supreme Court has held valid statutes prohibiting injunctive relief against it.⁸¹ This court has also held a state statute forbidding loitering or picketing at the scene of a labor dispute and forbidding the publicizing of the facts involved in the dispute between the employer and the union in the vicinity of the place of business of the employer to be unconstitutional as a denial of the freedom of speech and of the press.⁸² The state, however, has the power to confine the sphere of the publication of the grievances to that directly related to the dispute.⁸³ Under the provisions of the First and Fourteenth Amendments a state cannot forbid resort to a peaceful persuasion through picketing even though there is no employer-employee dispute, as in the case of attempted unionization of a business employing men not members of the union.⁸⁴ This rule has been extended to include a business without employees, but conducted solely by the owner.⁸⁵ All

⁷⁹ *Dorchy v Kansas*, 272 U. S. 306, 71 L. ed. 248.

⁸⁰ See *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. ed. 627, 123 A. L. R. 599, 612; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311, 128 A. L. R. 1044 (sit down strike not a restraint of trade under Sherman Anti-Trust Act).

⁸¹ *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229. See also *People v. Muller*, 286 N. Y. 281, 36 N. E. (2d) 206, 136 A. L. R. 1450, 1456.

⁸² *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 1093. See also *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. ed. 855; *Carlson v. California*, 310 U. S. 106, 84 L. ed. 1104; *American Federation of Labor v. Bain*, 165 Ore.

183, 106 P. (2d) 544, 130 A. L. R. 1278.

⁸³ *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437, 86 L. ed. 946; *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 86 L. ed. 1143.

⁸⁴ *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. ed. 855. See also *S & W Fine Foods, Inc. v. Retail Delivery Drivers & Salesmen's Union*, 11 Wash. (2d) 262, 118 P. (2d) 962. For criticism of the case of *American Federation of Labor v. Swing*, see concurring opinion of Justice Robinson.

⁸⁵ *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*, 313 U. S. 572, 85 L. ed. 1530 (reversing same case 14 N. Y. S. (2d) 198, 284 N. Y. 788, 31 N. E. (2d) 765);

picketing that is coercive is forbidden,⁸⁶ and when accompanied by violence or intimidation may be restrained.⁸⁷

§ 345. **Regulation of Trade—Monopolies.** The state, under the police power, may regulate trusts, monopolies and other combinations in restraint of trade, or to stifle competition or to raise prices for the reason that they are contrary to the public interest and to public policy. "The Constitution does not guarantee the unrestricted privilege to engage in business or to conduct it as one pleases," declared Justice Roberts. "Certain kinds of businesses may be prohibited, and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract or imposing terms if they do enter into agreements are within the state's competency."⁸⁸

The legislature may adopt appropriate statutes for the purpose of regulating or controlling prices whenever it concludes that conditions or practices in an industry either make unrestricted competition an inadequate safeguard of the consumer's interest, or produce waste harmful to the public, or portend to the destruction of the industry itself.⁸⁹ In these classes fall laws forbidding unfair competition by charging lower prices in one locality than those exacted in another, by giving trade inducements to purchasers and by other forms of price discriminations. Other trade practices which have been forbidden are: (a) Exclusive contracts by which the retailer may not deal with competitors of the seller;

O'Neil v. Building Service Employees International Union, Local No. 6, 9 Wash. (2d) 507, 115 P. (2d) 662, 137 A. L. R. 1102; Cafeteria Employees Union, Local 302 v. Angelos, 320 U. S. 293, 88 L. ed. 58.

⁸⁶ St. Germain v. Bakery & Confectionery Workers' Union, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917 F 824; Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 85 L. ed. 836, 132 A. L. R. 1200, 1218.

⁸⁷ Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 300,

85 L. ed. 836, 132 A. L. R. 1200. See also Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 315 U. S. 437, 86 L. ed. 946. See also note 86, supra.

⁸⁸ Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469; United States v. Rock Royal Co-operative, 307 U. S. 533, 83 L. ed. 1446; Tigner v. Texas, 310 U. S. 141, 84 L. ed. 1124, 130 A. L. R. 1321.

⁸⁹ Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679; Gibbs v. Buck, 307

(b) agreements among competitors to limit the production or sale of goods; (c) combination among competitors to fix prices; (d) agreements to injure a competitor through boycott or interfering with his market. A state or a municipality may itself enter into business in competition with private proprietors and thus effectively, though indirectly, control the prices charged by them.⁹⁰

Regulation and control of trade and business organizations are valid so long as they are enacted in the public interest and are not arbitrary, discriminatory or amount to an unnecessary and unwarranted interference with personal and property rights. "The Fifth Amendment in the field of federal activity, and the Fourteenth as respects the state's action do not prohibit governmental regulation for the public welfare," continued Justice Roberts. "They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process . . . demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."⁹¹

§ 346. Regulation of Financial Institutions—Sale of Securities.

The business conducted by such financial institutions as banks, insurance companies, savings banks and savings and loan associations are fraught with a public interest. They are quasi-public institutions. Their well being concerns not only their stockholders, but their depositors, their policyholders and the public at large.⁹² Banks are essential and indispensable financial agencies in the trade, industry and commerce of the state, as well as of the nation. They are the repositories of the money of the country, and the banker in a practical sense is the trustee of the fiscal affairs of

U. S. 66, 83 L. ed. 1111; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

⁹⁰ *Jones v. Portland*, 245 U. S. 217, 62 L. ed. 252, L. R. A. 1918 C 765, Ann. Cas. 1918 E 660; *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469; *United States v. Masonite Corp.*, 316 U. S. 265, 86 L. ed. 1461.

⁹¹ *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469; *Chicago, B. & Q. R. Co. v.*

Illinois, 200 U. S. 561, 50 L. ed. 596, 4 Ann. Cas. 575. See also *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956; *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109, 106 A. L. R. 1476.

⁹² *People ex rel. Nelson v. Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537, 101 A. L. R. 501.

the people, and banks are therefore the proper subject of regulation under the police power.⁹³

The state may appoint a commissioner or supervisor of banking, and invest him with power to charter banks; to examine their condition from time to time; and to take charge of them and liquidate their assets when, in his opinion, they are in an unsafe or insolvent condition, provided that his action shall be subject to judicial review.⁹⁴ Regulations may be made as to the capital and surplus of the bank, as to its reserves and as to its investments.⁹⁵ The state may require it to secure a license,⁹⁶ and to contribute to a depositor's guaranty fund. It may regulate the establishment of branch banks, and control the number of banks which may be organized in a community. But a state has no authority to define the duties, or to regulate the conduct or authority of national banks without the consent of the Federal government.⁹⁷

The whole business of insurance, including life, accident, fire, industrial, casualty, and all other forms of insurance, is subject to regulation and control by the state since it is affected with a public interest.⁹⁸ "The insurance business is quasi-public in character," asserted Justice Lively of the Supreme Court of West Virginia, "and the state may, under its police power, determine who may engage in the business, and prescribe the terms on which it may

⁹³ American Southern Nat. Bank v. Smith, 170 Ky. 512, 186 S. W. 482, Ann. Cas. 1918 B 959; Schaaake v. Dolley, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A 254.

⁹⁴ Blaker v. Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 340 Mo. 1133, 104 S. W. (2d) 385, 111 A. L. R. 133.

⁹⁵ Schaaake v. Dolley, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1918 A 254.

⁹⁶ Oil City v. Oil City Trust Co., 151 Pa. 454, 25 Atl. 124, 31 Am. St. Rep. 770.

⁹⁷ Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690; Marvin v. Kentucky Title Trust Co., 218

Ky. 135, 291 S. W. 17, 50 A. L. R. 1337; Schaaake v. Dolley, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A 254; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452; First Nat. Bank v. Commonwealth of Kentucky, 143 Ky. 816, 137 S. W. 518, 34 L. R. A. (N. S.) 54, Ann. Cas. 1912 D 378.

⁹⁸ State ex rel. Swearingen v. Bond, 96 W. Va. 193, 122 S. E. 539, 36 A. L. R. 1500; Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151, 27 A. L. R. 444; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 L. ed. 324, 72 A. L. R. 1163; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362; State ex rel. National Mutual Ins. Co. v. Conn, 115 Ohio St. 607, 155 N. E. 138, 50 A. L. R. 473.

be conducted, and generally to regulate it and all persons engaged in it." ⁹⁹

All the states have provided for the appointment or election of a commissioner or superintendent of insurance, or other regulatory official or board, and have given this authority power to issue licenses to companies and to agents, to make uniform rates, to protect the interest of policyholders and generally to supervise the insurance business within the state.¹⁰⁰ He may license or refuse to license for cause a company to do business in the state, and he may license or refuse to license for cause any agent, provided that his decision is subject to review by the courts.¹⁰¹ Statutes may prescribe the contents, forms and provisions of insurance policies, and the state may delegate to the commissioner or board authority to prescribe and to approve or disapprove policy contracts,¹⁰² to examine all companies doing business in the state and to value their policies, and their investments.¹⁰³ The commissioner may require the filing of reports and statements,¹⁰⁴ and may supervise and regulate insurance agents and brokers.¹⁰⁵ The state may provide by statute that the insurance commissioner shall be the receiver and liquidator of any insurance company insolvent and in the process of liquidation.¹⁰⁶

The state has the same authority to protect the public in the sale of securities as it has in protecting the people in their banking and insurance transactions. Most, if not all, states have enacted blue sky laws, which laws were in force long before the Congress considered it necessary to adopt the Security and Exchange Act.¹⁰⁷ These statutes have been enacted to protect the public from fraud and imposition in the sale to them of securities

⁹⁹ State ex rel. Swearingen v. Bond, 96 W. Va. 193, 122 S. E. 539, 36 A. L. R. 1500.

¹⁰⁰ Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A. L. R. 581; State ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878, L. R. A. 1915 B 976; Insurance Co. of North America v. Welsh, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918 E 471.

¹⁰¹ Insurance Co. of North America v. Welsh, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918 E 471.

¹⁰² Shelby Mutual Plate Glass & Casualty Co. v. Lynch, 89 N. H.

510, 2 A. (2d) 307, 119 A. L. R. 874.

¹⁰³ Greer v. Aetna Life Ins. Co. of Hartford, Conn., 225 Ala. 121, 142 So. 393, 84 A. L. R. 520.

¹⁰⁴ Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778.

¹⁰⁵ State ex rel. Swearingen v. Bond, 96 W. Va. 193, 122 S. E. 539, 36 A. L. R. 1500.

¹⁰⁶ Clark v. Williard, 292 U. S. 112, 78 L. ed. 1160.

¹⁰⁷ See Chap. 18, §§ 230-231, supra.

of little or no value or based upon unsubstantial projects and schemes.¹⁰⁸ Under them the state supervises the sale of speculative securities and forbids their sale without a license authorizing such transactions.¹⁰⁹ Sales made in violation of these statutes are generally held by the courts to be void.¹¹⁰

§ 347. **Improvement of Property—Zoning Laws.** The regulation and use and improvement of property is within the police power. One may not use his property so as to injure others. It may be controlled for the protection of the public health, safety and general welfare. It may be controlled so as to advance the beauty and convenience and comfort of the city by establishing zones or regions devoted exclusively to residence purposes, or ordinary business use.

“ ‘The segregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals and general welfare of the community,’ ” observed Justice Sutherland, in holding valid an ordinance excluding hotels and apartment houses from a residence district. “ ‘The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. . . . The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city’s territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development.’ ”¹¹¹ This power extends to attracting a desirable citizenship to a particular

¹⁰⁸ Hall v. Geiger-Jones Co., 242 U. S. 539, 61 L. ed. 480, L. R. A. 1917 F 524, Ann. Cas. 1917 C 643.

¹⁰⁹ Cities Service Co. v. Koenek, 137 Kan. 7, 20 P. (2d) 460, 87 A. L. R. 16.

¹¹⁰ Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A. L. R. 1.

¹¹¹ Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. ed. 303, 54 A. L. R. 1016. See also Miller v. Schoene, 276 U. S. 272, 72 L.

ed. 563; Grant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058; Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. ed. 322, 28 A. L. R. 1321; State ex rel. Woolworth v. State Board of Health, 237 Wis. 638, 298 N. W. 183, 136 A. L. R. 205; Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N. W. (2d) 84, 138 A. L. R. 495, 500; State ex rel. Synod v. Joseph, 139 Ohio St. 279, 39 N. E. (2d) 515, 138 A. L. R. 1274.

locality of a municipality and assuring its permanency, to fostering pride in and attachment to the city, to promoting happiness and contentment, and to stabilizing the use and value of property and the public tranquility and good order of the city.¹¹²

The exercise of the power must not violate the Fourteenth Amendment.¹¹³ Property cannot be taken without compensation or in violation of the due process of law clause.¹¹⁴ An enactment or regulation providing for race segregation is invalid.¹¹⁵

§ 348. Highways and Streets. The state or a municipal corporation may regulate highways and streets. "The regulation, maintenance and protection of highways, as well as the safety of travelers upon them, is everywhere and by all courts conceded to be within the jurisdiction maintaining them," declared Justice Thomas of the Kentucky Court of Appeals. "Such regulatory authority in the exercise of the state police power may also apply to and operate upon nonresidents or those engaged exclusively in interstate commerce, as well as those engaged in intrastate commerce, and especially so when the field of regulating interstate commerce by highway traffic has not been taken over by the federal Congress, and which latter is true at this time."¹¹⁶

Under this power, the state may license vehicles and control their speed. A city may license taxicabs and establish rules for their regulation. A city may prohibit the use of advertising on trucks, vans and other vehicles, or it may prohibit the distribution on the streets of all commercial and business advertising. It may control the sprinkling and cleaning of streets, and the regulation of hours and places for parking automobiles, taxicabs and trucks. It may install and operate parking meters. It may prevent or prohibit the obstruction of streets by telegraph poles, shade trees, signs, electric wires or any other method of obstruction that might interfere with traffic or be dangerous to the public use of streets and highways.¹¹⁷

¹¹² *Wisconsin v. Harper*, 182 Wis. 148, 196 N. W. 451, 33 A. L. R. 269.

¹¹³ *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. ed. 303, 54 A. L. R. 1016; *Gorieb v. Fox*, 274 U. S. 603, 71 L. ed. 1228, 53 A. L. R. 1210; *Nectow v. City of Cambridge*, 277 U. S. 183, 72 L. ed. 842.

¹¹⁴ See Chap. 22, §§ 279-282.

¹¹⁵ See Chap. 21, § 271, *supra*.

¹¹⁶ *Ashland Transfer Co. v. State Tax Commission*, 274 Ky. 144, 56 S. W. (2d) 691, 87 A. L. R. 534.

¹¹⁷ *Ashland Transfer Co. v. State Tax Commission*, 274 Ky. 144, 56 S. W. (2d) 691, 87 A. L. R. 534; *Edwards v. Thrash*, 26 Okla. 472, 109 Pac. 832, 138 Am. St. Rep. 975; *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917 A 1216; *Valentine v. Christensen*, 316 U. S. 52, 86 L. ed. 1262.

CHAPTER 28

POWER OF TAXATION

The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

—Justice Stone

§ 349. **Definition—Lien.** Taxes are ratable charges imposed by the legislative power upon persons and property to raise money for public purposes. Taxation implies an equality of burdens and a regular distribution of expenses of government among the persons taxed.¹ “The purpose of taxation,” declared Justice Matthews of the Supreme Court of Montana, “is to raise the necessary revenue for the support of the government and the consequent security of the people in the possession of their property. . . . Taxes are levied against the person, not against property—property serving only as a basis for computing each person’s measure of liability and as security for the discharge of the lien which the tax imposes—and in no way depend upon the will or consent, express or implied, of the person taxed, and, therefore, when levied, do not become a debt within the meaning of the word as ordinarily used. Further, no lien exists on property as such security for taxes unless the legislature has so declared.”²

§ 350. **Power.** A sovereign state has legislative power to determine the subjects of taxation for general or for particular public purposes. This power is an inherent right or attribute of sovereignty and belongs to every independent state or government.

¹ State v. District Court, 101 Mont. 176, 53 P. (2d) 107, 103 A. L. R. 376; Taylor v. Gehner, 329 Mo. 511, 45 S. W. (2d) 59, 82 A. L. R. 189 Okla. 232, 115 P. (2d) 120, 136 A. L. R. 324.

² State v. District Court, 101

"The power to tax is an incident of sovereignty," remarked Chief Justice Stone (quoting Marshall), "and is coextensive with that to which it is incident. All subjects over which the sovereign power of a state extends are objects of taxation."³ The legislature must determine what taxes shall be laid, in what amounts and upon what persons or objects. This includes special assessments and general taxes, both of which must be provided for either through general laws or specific enactments of the legislative arm of the government. This power is one of the highest, if not the highest, prerogative of the legislature.⁴

Its power is as omnipotent as that of the Parliament of England, save only as it is restrained by the Federal and state constitutions.⁵ But it is implicit in all these constitutions that the property of the citizen may be taken from him under the guise of taxation only to meet definite public needs.⁶

The courts have no power to levy taxes and they are not concerned with the wisdom, expediency or economic policy of a tax law. But they do have jurisdiction over questions of whether constitutional limitations have been infringed or whether the tax may be an arbitrary abuse of power or so excessive as to amount to fraud. "We have repeatedly held," asserted Justice Holcomb of the Supreme Court of Washington, "that equity will grant relief when taxes are arbitrarily and not uniformly assessed; and when the valuation of real property is palpably excessive, it will be treated as constructively fraudulent."⁷

Unlike the sovereign state, municipal corporations and other governmental subdivisions possess no inherent power of taxation. The constitutions of the several states, however, generally provide that the legislature may vest such power in them and, in delegating such authority to municipalities and other subordinate districts, the legislatures have generally seen fit to hedge the power about with restrictions calculated to protect the taxpayer against abuse

³ *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. ed. 1097, 141 A. L. R. 948.

⁴ *Taylor v. Gehner*, 329 Mo. 511, 45 S. W. (2d) 59, 82 A. L. R. 986; *Daytona Beach v. King*, 132 Fla. 273, 181 So. 1, 116 A. L. R. 880.

⁵ *Hudson Motor Car Co. v. Detroit*, 282 Mich. 69, 275 N. W. 770, 113 A. L. R. 1472.

⁶ *Weyerhaeuser Timber Co. v. Roessler*, 2 Wash. (2d) 304, 97 P. (2d) 1070, 126 A. L. R. 882.

⁷ *Island County v. Calvin Phillips & Co.*, 195 Wash. 265, 80 P. (2d) 840. See also *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 273; *Burnett v. Greene*, 97 Fla. 1007, 122 So. 570, 69 A. L. R. 244, 266.

of the power by unnecessary or excessive exactions, such as the enactment of a budget law and requiring that municipal funds shall be spent only for public purposes. But the taxing power cannot be delegated to school districts and other incorporated districts not possessing the governmental attributes of municipalities.⁸ A municipal tax for a purpose not authorized by law is invalid.⁹

The legislature may delegate the execution of the taxing power and in most, if not all, of the states it rests with an officer or officers elected by the people or with a commission generally known as the tax commission. These officers or commissions may further delegate their ministerial duties but their quasi-judicial duties are non-delegable. "The fact that the legislature gave the Tax Commission authority to employ agents, statisticians, experts, attorneys and other assistants and employees as may be necessary to perform its duties does not give the Commission authority directly or by implication to deputize those matters which are quasi-judicial in character," announced Justice Wolf of the Supreme Court of Utah in holding invalid a penalty fixed by an auditor employed by the state Tax Commission. "It takes authority from the legislature to appoint a general deputy."¹⁰

§ 351. Purpose. It is an underlying principle of our government that taxes can be laid for public purposes only. The power is founded upon the right, duty and responsibility of the government to be able to administer all governmental functions and to provide funds or property with which to promote the general welfare and protection of its citizens. This power, wisely administered, can promote the general welfare and happiness of a people or a nation and, unwisely administered, carries the power to wreck or destroy.¹¹

What constitutes a public purpose is frequently a difficult question to decide. Generally speaking, the phrase "public purpose" is synonymous with "governmental purpose" and this means that it shall affect all the inhabitants as a community and not as individuals. Whatever lawfully pertains to this purpose and is sanc-

⁸ *Wilson v. School Dist.*, 328 Pa. 225, 195 Atl. 90, 113 A. L. R. 1401.

⁹ *Daytona Beach v. King*, 132 Fla. 273, 181 So. 1, 116 A. L. R. 880; *Weyerhaeuser Timber Co. v. Roessler*, 2 Wash. (2d) 304, 97 P. (2d) 1070, 126 A. L. R. 882.

¹⁰ *State Tax Commission v. Katsis*, 90 Utah 406, 62 P. (2d) 120, 107 A. L. R. 1477; *Searle v. Yensen*, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.

¹¹ *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113

tioned by time and the acquiescence of the people may be said to be a public purpose.¹²

The following examples have been held by the courts to be public purposes: erection of public buildings such as a state house, county building or court house; erection of library, hospital or school building; operation of state universities, normal schools and other public schools; relief of the poor; public highways, rivers and harbors; and generally all expenses necessary for the administration of governmental affairs.¹³

§ 352. Immunity of Federal and State Governments from Taxation by Each Other. Our dual system of government imposes limitations upon the United States in respect to taxing the instrumentalities and agencies employed by the state and it also inhibits the states from taxing instrumentalities, functions and agencies utilized by the United States. The reason for these limitations is that both governments operate within the same territorial limits and both must be free to use their respective powers without the curtailment or interference of the other. This is necessary in order that our dual system of government may be maintained.

The Constitution contemplates that neither government shall obstruct, embarrass or nullify the legitimate operations of the other, nor destroy the means and agencies of it in the exercise of its delegated or reserved powers or essential governmental duties. No state, therefore, may tax appropriate means which the United States may use for the exercise of its delegated powers, and the United States may not tax instrumentalities which a state may use in the discharge of her essential governmental duties.¹⁴ "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers," asserted Justice Stone. "Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with

A. L. R. 1195; *Daytona Beach v. King*, 132 Fla. 273, 181 So. 1, 116 A. L. R. 880.

¹² *Stanley v. Jeffries*, 86 Mont. 114, 284 Pac. 134, 70 A. L. R. 166.

¹³ *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195; *Daytona Beach v.*

King, 132 Fla. 273, 181 So. 1, 116 A. L. R. 880.

¹⁴ *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. ed. 845; *Lee v. Osceola & Little River Road Improvement Dist.*, 268 U. S. 643, 69 L. ed. 1133; *United States v. County of Allegheny*, 322 U. S. 174, 88 L. ed. 1209.

the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of government. . . . ”¹⁵

The application of these rules has caused the courts much difficulty and the decisions are not in entire harmony. It is well settled, however, that both governments are exempt from all taxation in the performance of strictly governmental duties.¹⁶ “Just what instrumentalities of either a state or the Federal government are exempt from taxation by the other cannot be stated in terms of universal application,” asserted Justice Stone. “But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. . . . Its obligations sold to raise public funds; its investment of public funds in the securities of private corporations for public purposes, surety bonds exacted by it in the exercise of its police power are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself, but to income derived from it. . . .” But the immunity of the Federal government from state regulation will not be extended beyond the government itself and the governmental functions performed by its officers and agents.¹⁷

Formerly, the compensation of the officers and employees of the Federal government was not taxable by the states, and the compensation of the officers and employees of the state governments was not taxable by the Federal government. Then, in 1939, the Supreme Court, in a leading case, held that the salary of an attorney of the Federal Home Owners’ Loan Corporation was tax-

¹⁵ *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384. See also *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 78 P. (2d) 731, 117 A. L. R. 838; *Helvering v. Therrell*, 303 U. S. 218, 82 L. ed. 758; *Commissioner of Internal Revenue v. Scottish American Inv. Co.*, 323 U. S. 119, 89 L. ed. 113.

¹⁶ *Educational Film Corp. v. Ward*, 282 U. S. 379, 75 L. ed. 400,

71 A. L. R. 1226; *Helvering v. Therrell*, 303 U. S. 218, 82 L. ed. 758.

¹⁷ *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384; *Cleveland v. United States*, 323 U. S. 329, 89 L. ed. 274; *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, 87 L. ed. 748 (state tax held valid on sale of milk to army at military encampment on land leased from state). But see also

able by the state of New York.¹⁸ With this case as a precedent, Congress later enacted a statute (a) extending the income to include all state and local officers and employees and (b) consenting that taxes (state and local) might be levied against all officers and employees of the United States, of territories, including the District of Columbia, and of the possessions of the United States.¹⁹

Revenue stamps cannot be required by one government upon the legal instruments executed by the other, and such documents cannot be refused admission as evidence in the courts. The Supreme Court has also held that Congress may constitutionally immunize from state taxation activities of the Federal land banks which are in the furtherance of the lending powers of such banks since such functions are governmental rather than proprietary. And a state may not require the driver of a Federal government motor truck, carrying mail, to procure a state license. Army post exchanges, established by the regulations of the War Department, are arms of the government and sales to them are not subject to taxation by the state.²⁰

Exemption, however, does not extend to every instrumentality. It depends upon the nature of the undertaking. The courts have held that, whenever a state engages in a business of a private nature, it exercises nongovernmental functions and the business, though conducted by the state, is not immune from taxation by Congress. "The state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend," declared Justice Hughes. "The fact that the state has power

Pacific Coast Dairy v. Department of Agriculture, 318 U. S. 285, 87 L. ed. 761 (tax on sale of milk to armed forces prohibited on Federal enclave within a state over which the Federal government has acquired exclusive jurisdiction).

¹⁸ *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 83 L. ed. 927, 120 A. L. R. 1466.

¹⁹ See Chap. 17, § 196, *supra*. See also 26 USC 22 and 5 USC 84a.

²⁰ *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 84 L. ed.

11, 124 A. L. R. 1263; *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U. S. 95, 86 L. ed. 65; *Gift v. Love*, 164 Miss. 442, 144 So. 562, 86 A. L. R. 63; *Johnson v. Maryland*, 254 U. S. 1, 65 L. ed. 126; *National Life Ins. Co. v. United States*, 277 U. S. 508, 72 L. ed. 968; *Willeuts v. Bunn*, 282 U. S. 216, 75 L. ed. 304; *Droll v. Furnas County*, 108 Neb. 85, 187 N. W. 876, 26 A. L. R. 543.

to undertake such enterprises and they are undertaken for what the state conceives to be the public benefit does not establish immunity. The necessary protection of the independence of the state government is not deemed to go so far."²¹

By statute, the state may tax the real estate and the capital stock of national banks²² but the Supreme Court has held that Congress may withdraw this privilege at will, even as to existing liens.²³ The Federal Land Bank and the Federal Reserve Bank are required to pay filing fees in cases pending in state courts and to pay fees for recording instruments. "Of course, the state is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution," declared Justice Holmes. These corporations and other instrumentalities of the Federal government cannot be required to pay license fees required by domestic and foreign corporations. They cannot be required to pay a state sales tax and the Supreme Court has upheld the exemption from taxation of the property of the Federal Housing authority.²⁴ A State may not tax the bonds or other securities of the United States, but a state tax may be applied to the succession of such bonds or securities, as such tax is not on the bonds but on the right of succession. Neither may Congress tax state bonds or securities or those of a state subdivision such as a city, country or school district.²⁵ Lands for which the United States has, by final certificate, parted with equitable title are also subject to taxation by a state. So are the gross receipts from copyrights held in private ownership and used for private advantage.²⁶

²¹ *Helvering v. Powers*, Executor, 293 U. S. 214, 79 L. ed. 291. See also *University of Illinois v. United States*, 289 U. S. 48, 77 L. ed. 1025.

²² *Churchill v. Utica*, 3 Wall. 573, 18 L. ed. 229; *Des Moines Bank v. Fairweather*, 263 U. S. 103, 68 L. ed. 191; *Tradesmens Nat. Bank v. Oklahoma Tax Commission*, 309 U. S. 560, 84 L. ed. 947.

²³ *Maricopa County v. Valley Nat. Bank*, 318 U. S. 357, 87 L. ed. 501.

²⁴ *Federal Land Bank v. Crossland*, 261 U. S. 376, 67 L. ed. 703. See also *Pittman v. Home Owners'*

Loan Corp., 308 U. S. 21, 84 L. ed. 11, 124 A. L. R. 1263. *Federal Land Bank v. Statelen*, 191 Wash. 155, 70 P. (2d) 1053; *Federal Land Bank of St. Paul v. Bismark Lumber Co.* 314 U. S. 95, 86 L. ed. 65; *Cleveland v. United States*, 323 U. S. 329, 89 L. ed. 274.

²⁵ *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 275 U. S. 136, 72 L. ed. 202; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 73 L. ed. 874, 65 A. L. R. 866; *Blodgett v. Silberman*, 277 U. S. 1, 72 L. ed. 749; *Standard Oil Co. of California v. Johnson*, 316 U. S. 481, 86 L. ed. 1611.

²⁶ *Irwin v. Wright*, 258 U. S.

The exemption of the property of Federal agencies from taxation by the state governments falls into two groups: (a) Decisions holding the transactions of the agencies automatically exempt, except when Congress has authorized taxation, for example, machinery owned by the United States and leased to a contractor for use in performing a government contract was held not subject to taxation; and (b) decisions holding that there is no exemption, except when Congress has expressly provided for it. An illustration of this class are the cost-plus contracts for the construction of Federal projects. Congress has refused to grant immunity for these contracts.²⁷

§ 353. Limitations. Limitations are imposed upon the power of a state to tax by the Constitutions of the several states, by the Federal Constitution and by treaties entered into by the United States with foreign nations.

(A) *State Constitutions.* The Constitutions of all of the states contain provisions relating to taxation. These provisions are limitations upon the powers of the legislature and generally require, among other provisions, for a uniform and equal rate of assessment and a just valuation of property such as is contained in the Constitution of Indiana. "The General Assembly shall provide by law," reads Section 1, "for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law." Some states specifically exempt from taxation the property of the United States and of the state.²⁸

Included in the several Constitutions are also additional limitations and provisions relating to an income tax, an occupation tax, taxation of tangible property, taxation of intangibles, taxation of franchises and sales taxes, as well as other forms of taxation.²⁹

219, 66 L. ed. 573; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 76 L. ed. 1010.

²⁷ *United States v. County of Allegheny*, 322 U. S. 174, 88 L. ed. 1209; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 86 L. ed. 1611; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3.

²⁸ Constitution of Indiana, Art. X, § 1. See Constitution of Utah, Art. XIII, § 2.

²⁹ See Constitution of Nebraska, Art. VIII, § 1; Constitution of Minnesota, Art. IX; Constitution of Kansas, Art. XI, § 2.

Constitutions and statutes in several states place a limit upon the amount of taxes which may be assessed or the amount that may be levied on a particular kind of property³⁰ and stipulate that the power of taxation shall never be surrendered, suspended or contracted away.³¹ The Florida Constitution provides that "no tax shall be levied for the benefit of any chartered company of the state, nor paying interest on any bonds issued by such chartered companies, or by counties, or by corporations, for the above mentioned purpose."³² These limitations extend to municipalities, quasi-municipalities, such as counties and townships, as well as all incorporated districts having the power of taxation.³³ These limitations must be strictly observed. Taxes levied in violation of them are void.³⁴

(B) *Federal Constitution.* The power of taxation of the states is limited further by specific provisions of the Federal Constitution, including the Fourteenth Amendment, and by the principle that the power of the state must not be exercised so as to interfere with the full execution by Congress of the powers and duties entrusted to it.³⁵ But a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefits received as to amount to an arbitrary taking of property without compensation.³⁶

The Federal government, however, will not act as a policeman over the state governments or attempt to correct unwise legislation. "This vital power of taxation may be abused," observed Chief Justice Marshall at an early date, "but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by state governments. The interest, wisdom, and justice of the representative body, and

³⁰ See Constitution of West Virginia, Art. X, § 1; 11 Rem. Rev. Stats., § 11238-1c (limiting taxes levied on real estate).

³¹ Oklahoma Constitution, Art. X, § 5; Constitution of Louisiana, Art. X, § 1; Constitution of North Dakota, Art. XI, § 178.

³² Constitution of Florida, Art. IX, § 7. See also *Daytona Beach v. King*, 132 Fla. 273, 181 So. 1, 116 A. L. R. 880.

³³ *Wilson v. School Dist.*, 328 Pa. 225, 195 Atl. 90, 113 A. L. R. 1401.

³⁴ *Walker v. Wiley*, 177 Wash. 483, 32 P. (2d) 1062.

³⁵ *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 78 P. (2d) 731, 117 A. L. R. 838; *Dane v. Jackson*, 256 U. S. 589, 65 L. ed. 1107.

³⁶ *Dane v. Jackson*, 256 U. S. 589, 65 L. ed. 1107.

its relation with its constituents, furnish the only security, where there is no express contract against unjust and excessive taxation, as well as unwise legislation generally."³⁷ Examples of these restrictions are that a state may not lay any imposts or duties on imports and exports, except as may be necessary for the execution of its inspection laws; a state may not tax interstate and foreign commerce; and a state may not impair the obligations of contracts or deprive citizens of their property without due process of law.³⁸

(C) *Treaties*. The taxing power of the state is also limited by treaties entered into by the United States with foreign nations. The reason for this rule is that all treaties entered into under the authority of the United States are superior to the constitution and laws of any individual state. Because of a treaty, therefore, between the United States and Japan, the State of California was forbidden to collect a poll tax from subjects of Japan contrary to the terms of the treaty. "The treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations," asserted Chief Justice Angelotti of the Supreme Court of California, "and, with regard to such matters, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states."³⁹

§ 354. Equality and Uniformity. Taxes should be general in their application and should be equal and uniform and should be levied in accordance with some reasonable rule of apportionment. This is necessary in order that the burden of government shall be uniformly distributed. The Constitutions of almost all states have provisions relating to equality and uniformity. While these provisions vary, they are, in effect, similar to the Constitution of Maine, which requires that "all taxes upon real and personal estate, assessed by the authority of the state, shall be apportioned and assessed equally, according to the just value thereof."⁴⁰

³⁷ *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, 956.

³⁸ Constitution, Art. I, § 10, cl. 1-2; Fourteenth Amendment, § 1. See Chap. 18, §§ 222-223, *supra*.

³⁹ *Ex parte Terni*, 187 Cal. 20, 200 Pac. 954, 17 A. L. R. 630 (quoting Justice Field in *Geofroy*

v. Riggs, 133 U. S. 256, 33 L. ed. 642).

⁴⁰ *Sweet v. Auburn*, 134 Me. 28, 180 Atl. 803, 104 A. L. R. 784; *Whaley v. Northern Road Improvement Dist.*, 152 Ark. 573, 240 S. W. 1, 24 A. L. R. 934; Constitution of Maine, Art. IX, § 8; Con-

Absolute equality is impracticable, however, and is not required by the due process and equal protection clauses of the Federal Constitution. “. . . A state [shall] be free to select the subjects of taxation and to grant exemptions,” declared Justice Stone. “Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. . . . A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution.” ⁴¹⁻⁴²

Classification of subjects is constitutional if it is based on reasonable grounds and is not an arbitrary selection, is not a subterfuge to shield one class and unduly burden another and does not unlawfully oppress in its administration. There can be no discrimination between subjects which belong to the same class. These must bear equally and uniformly the burden imposed. The theory is that classification is allowed in order to avoid inequalities and not to create them. The most important element in the work of a taxing board is good faith.⁴³ Any system by which the whole burden is placed upon a single class is unconstitutional. For example, a tax levied exclusively on real estate exempting building improvements and personal property is unconstitutional. The taxation of one class upon its earning value and of another on its market value is

stitution of Colorado, Art. X, § 3; Constitution of Kentucky; § 171; Constitution of Tennessee, Art. II, § 28; *Pierce v. Green*, 229 Iowa 22, 294 N. W. 237, 131 A. L. R. 335.

⁴¹⁻⁴² *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. ed. 1245, 109 A. L. R. 1327; *Frazier v. State Tax Commission*, 234 Ala. 353, 175 So. 402, 110 A. L. R. 1479; *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362, 84 L. ed. 1254. See also *Caskey Baking Co. v. Virginia*, 313 U. S. 117, 85 L. ed. 1223; *Koesis v. Chicago Park Dist.*, 362 Ill. 24, 198 N. E. 847, 103 A. L. R. 141; *Barbier v. Connolly*, 113 U. S.

27, 28 L. ed. 923; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892. See also *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22, 68 L. ed. 541; *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 78 L. ed. 1025; *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 78 L. ed. 1411; *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182, 89 L. ed. 857 (notes may be placed in a different class from personal property used in agriculture).

⁴³ *Frazier v. State Tax Commission*, 234 Ala. 353, 175 So. 402, 110 A. L. R. 1479.

also unconstitutional. Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, are obnoxious to the Constitutional prohibition.⁴⁴

§ 355. Double Taxation. Double taxation means taxing the same person or property in the same territory or district for the same purpose twice in one year without taxing all persons and property in the same manner. This form of taxation is forbidden by the Constitution of several states. In others, it is held to be a violation of the rule of equality and uniformity. The Constitution of the United States does not prohibit double taxation by a state. Illustrating what amounted to double taxation, Chief Justice Terrell of the Supreme Court of Florida remarked that "The imposition of an ad valorem tax twice upon the same person or property for the same purpose because of such ownership would be double taxation in violation of law, but both impositions must be taxes as distinguished from other impositions. If one is a tax and the other a license fee or special assessment, double taxation is not accomplished. It is also well settled that two taxes for the same purpose, one general and the other special, are not obnoxious as double taxation when all taxable property in the district is subject to both taxes."⁴⁵ Other examples of permissible double taxation are a tax on a mortgage as personal property and a tax also on the full value of the real estate; a tax upon the capital stock of a corporation as a whole and upon its shareholders for their shares.⁴⁶

§ 356. Taxation of Tangible Property. Tangible real and personal property may be taxed only in the state where they have their situs. It is essential to the validity of a tax on these forms of property that the property shall be within the territorial jurisdiction of the taxing power.⁴⁷

⁴⁴ Wells v. Commissioners of Hyattsville, 77 Md. 125, 20 Atl. 357, 20 L. R. A. 89; Wells, Fargo & Co. v. Johnson, 214 Fed. 180, L. R. A. 1916 C 522; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892.

⁴⁵ Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A. L. R. 156.

⁴⁶ State v. Buder, 308 Mo. 237, 271 S. W. 508, 39 A. L. R. 1199; State v. Smith, 158 Ind. 543, 63 N. E. 214, 63 L. R. A. 116.

⁴⁷ Frick v. Pennsylvania, 268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316. See note 49, *infra*.

This rule receives its most familiar illustration in the case of land, which, to be taxable, must be within the limits of the state. In fact there are no cases in which the legislature of one state has assumed to impose a tax upon land within the jurisdiction of another state. The same rule applies with equal cogency to tangible personal property beyond the jurisdiction. It is beyond the sovereignty of the taxing state.⁴⁸

“Rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located . . . for purposes of taxation. [This] is a doctrine generally accepted both in the common law and [in] other legal systems before the adoption of the Fourteenth Amendment and since,” declared Justice Stone. “The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax.”⁴⁹

But rents, interests, and other income received by a resident of a state from real estate or personal property located in another state may be taxed by the state under an income tax law laid upon the entire net income of its resident, the court holding that a state can constitutionally tax the net income of its own inhabitants from both tangible and intangible property wherever located. The Supreme Court has also held that a state may lay a tax, under a

⁴⁸ *Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 199 U. S. 194, 50 L. ed. 150. S. 357, 83 L. ed. 1339, 123 A. L. R. 162. See also *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S.

⁴⁹ *Curry v. McCanless*, 307 U. 567, 71 L. ed. 413.

gross income law, upon a foreign corporation in respect of a sale and delivery by it in the state to a railroad company of railroad ties even though the purchase price was paid outside of the State.⁵⁰

§ 357. **Taxation of Intangible Property.** The taxation of intangible property, such as bonds, stocks, negotiable instruments, mortgages and other evidences of debt, differs from that of tangible property. Intangible rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts. The power of government over them and the protection which it gives them cannot be exerted through the control of a physical thing. They can be made effective only through control over and protection afforded those persons whose relationship are the origin of the rights. They cannot be dissociated from the persons from whose relationships they are derived. Therefore, the jurisdiction to tax does not depend on physical presence within the state and is not lost by declaring that it is absent.

In cases where the owner confines his activity exclusively to the place of his domicile, it has been found convenient to invoke the maxim *mobilia sequuntur personam*. But when the taxpayer extends his activities so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of tax gatherers, there the rule of a single place of taxation no longer avails. "There are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles," declared Justice Stone, continuing this reasoning. "Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and the state of the recipient's domicile. Protection, benefit and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. But taxation of a corporation by

⁵⁰ New York ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. ed. 668, 108 A. L. R. 721; Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371; De-

partment of Treasury v. Wood Preserving Co., 313 U. S. 62, 85 L. ed. 1188; Maguire v. Trefry, 253 U. S. 12, 64 L. ed. 739.

a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." ⁵¹

This double taxation is not prohibited by the Fourteenth Amendment ⁵² and the amendment also does not prohibit a state from taxing the deposits of its citizens in banks without the state at a higher rate than deposits in banks within the state. ⁵³ The jurisdiction of the state to tax this form of property is dependent not on the physical location of the property but on the control of the state over the owner. ⁵⁴ A foreign corporation, which has established a commercial domicile in a state from which it conducts its business, is subject to taxation there upon its intangibles unless such taxation infringes the commerce clause. ⁵⁵

§ 358. Taxation System. The taxation system involves two processes: (a) the process of assessment and (b) the process of collection. Both of these processes are included in the rule of uniformity and equality.

An assessment is the valuation of property for taxation purposes under and in accordance with an enactment of the legislature adopted for such purpose. The following requirements are necessary to a valid assessment: (a) There must be a formal act of assessment, listing the property and including it in the tax roll; (b) the valuation of the property must be set forth; (c) the assessment must be made by the officer or board elected or appointed for the purpose; (d) a description of the property must be included; (e) the amount of the tax cannot exceed that authorized by the legislature; (f) the assessment may be against the property itself rather than the person owning the property; (g) the taxpayer must have notice of the proceeding and an opportunity to defend his rights. ⁵⁶

⁵¹ *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162; *Citizens Nat. Bank v. Durr*, 257 U. S. 99, 66 L. ed. 149; *Central Hanover Bank & Trust Co. v. Kelly*, 319 U. S. 94, 87 L. ed. 1282.

⁵² *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162; *Blodgett v. Silberman*, 277 U. S. 1, 72 L. ed. 749.

⁵³ *Madden v. Kentucky*, 309 U. S. 83, 84 L. ed. 590.

⁵⁴ *Pearson v. McGraw*, 308 U. S. 313, 84 L. ed. 293.

⁵⁵ *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 86 L. ed. 1090.

⁵⁶ See generally *Maxwell v. Page*, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155; *Yunker Bros. v. Zirbel*, 234 Iowa 269, 12 N. W. (2d) 219, 151 A. L. R. 242.

In some states the Constitution prescribes a penalty for wilful errors in making assessments. For example, the Constitution of Oklahoma provides that "Any officer or other person authorized to assess values, or subjects, for taxation, who shall commit any wilful error, shall be deemed guilty of malfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."⁵⁷

By statute, a tax properly assessed becomes a lien against the property. Real estate taxes and succession taxes are generally made liens. Frequently, personal property and other taxes are also made liens against the property. These liens are enforced in accordance with the machinery provided by statute. "The legislature may prescribe, by law," observed Justice Parker of the Supreme Court of New Mexico, "what shall be essential and what unessential in taxation proceedings, subject only to the fundamental principle that a person whose property is to be subject to taxation must have notice and an opportunity to be heard as to the amount of the charge upon his property or, in other words, that due process of law must be provided for . . . Notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process if he has an opportunity to question the validity or the amount of the assessment, either before that amount is finally determined or in subsequent proceedings for its collection."⁵⁸ The great weight of authority supports the rule that a tax is not a debt in the ordinary acceptance of the term and that a civil action will not lie for its recovery, except where the statute expressly confers the right to bring such action.⁵⁹

The collection of taxes may be a purely ministerial function. In such case the function is usually performed by an officer known as the "Tax Collector." In the case of income and succession taxes, the collection is frequently made by a commission known as the "State Board" or "State Tax Commission," and the functions performed by such board or commission may be both ministerial and quasi-judicial. Unless expressly authorized by statute, the

⁵⁷ Constitution of Oklahoma, Art. X, § 8.

⁵⁸ *Maxwell v. Page*, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155.

⁵⁹ *Messer v. Lang*, 129 Fla. 546, 176 So. 548, 113 A. L. R. 1073; *Sapulpa v. Land*, 101 Okla. 22, 223

Pac. 640, 35 A. L. R. 872; *Meriweather v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *State v. New England Furniture & Carpet Co.*, 107 Minn. 52, 119 N. W. 427, 16 Ann. Cas. 470.

employment of a "tax ferret" to search out property escaping taxation is against public policy and is illegal.⁶⁰

§ 359. **Exemptions from Taxation.** The power to tax implies the power to exempt from taxation. Unless, therefore, restrained by constitutional provision, the legislature has full power to exempt any person or class of persons or a corporation or class of property from taxation, according to its views of the requirements of public policy and expediency. The exemption, however, must be granted by express words in the charter or statute. It cannot be created by implication. "An exemption from taxation will never be presumed and the burden is on a claimant to establish clearly his right to an exemption," averred Justice Cook of the Supreme Court of Mississippi. "The rule is universal that he who claims exemption must show, affirmatively, an exemption expressly declared and that the claimant is clearly embraced within the terms of the exemption. If an exemption is found to exist, it must not be enlarged by construction since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant."⁶¹

If founded upon a consideration, the exemption may become a contract which the state cannot impair. Since most state Constitutions today provide that all corporation charters shall be subject to amendment, alteration or repeal, the legislature as a general rule cannot at the present time grant a valid irrevocable exemption, even though it may attempt to do so.⁶²

⁶⁰ State Tax Commission v. Katsis, 90 Utah 406, 62 P. (2d) 120, 107 A. L. R. 1477; Murphy v. Swanson, 50 N. D. 788, 198 N. W. 116, 32 A. L. R. 82; Lorillard v. Town of Monroe, 11 N. Y. 392, 62 Am. Dec. 120.

⁶¹ Barnes v. Jones, 139 Miss. 675, 103 So. 773, 43 A. L. R. 673. See also Board of Trustees, Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A. L. R. 465. See Chap. 25, § 320, *supra*; New York Rapid Transit

Corp. v. City of New York, 303 U. S. 573, 82 L. ed. 1024.

⁶² People ex rel. Baldwin v. Jessamine Withers Home, 312 Ill. 136, 143 N. E. 414, 34 A. L. R. 628; State Tax Commission v. Board of Education, 146 Kan. 722, 73 P. (2d) 49, 115 A. L. R. 1401; New York ex rel. Troy Union R. Co. v. Mealy, 254 U. S. 47, 65 L. ed. 123; Piqua Branch of State Bank of Ohio v. Knoop, 16 How. 369, 14 L. ed. 977.

The property usually enjoying the exemption privilege is that belonging to religious, charitable, benevolent, scientific, literary and educational institutions. Exemptions of homesteads, household furniture and certain personal property in limited amounts is also valid. Some states exempt property of corporations engaged in manufacturing, or the manufacturing industry itself. Exemptions not granted or authorized by the constitution or statutes are void.⁶³

§ 360. Property—Excise Taxes. Property taxes are those assessed or levied on all property, or on all property of a certain class, located within a certain territory or district on a fixed or specified date in accordance with some reasonable or accepted method of apportionment, the obligation to pay which taxes is absolute and unavoidable.⁶⁴ It includes every tax imposed upon property no matter what it is called.⁶⁵ It includes taxes on all tangibles. It includes those on both real estate and personal property. It includes those on easements, leases and mining rights and interests which are constituent of ownership.⁶⁶ A tax on the capital stock of a corporation is a property tax⁶⁷ and so is a tax on ownership or the right of ownership.⁶⁸

Excise taxes include all forms of taxation which are not burdens laid directly upon persons or property. They are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges. They include every form of charge or tax im-

⁶³ Constitution of Missouri, Art. X, §§ 6-7; Constitution of South Dakota, Art. XI, §§ 6-7; Constitution of Tennessee, Art. II, § 28; Constitution of Nebraska, Art. VIII, § 2; *American Newspapers v. McCardell*, 174 Md. 56, 197 Atl. 574, 116 A. L. R. 1108; *Board of Trustees, Lawrence University v. Outagamie County*, 150 Wis. 244, 136 N. W. 619, 2 A. L. R. 465.

⁶⁴ *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748.

⁶⁵ *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977, L. R. A. 1916 A 846.

⁶⁶ *Collector of Taxes v. Boston*, 278 Mass. 274, 180 N. E. 116, 81 A. L. R. 1515; *Fidelity Trust Co. v. Wayne County*, 244 Mich. 182, 221 N. W. 111, 59 A. L. R. 698; *Redfield v. Fisher*, 135 Ore. 180, 292 Pac. 813, 295 Pac. 461, 73 A. L. R. 721. See § 356, this chapter, *supra*; *State ex rel. Porterie v. Hunt*, 182 La. 1073, 162 So. 777, 103 A. L. R. 9, 18.

⁶⁷ *Spokane & Eastern Trust Co. v. Spokane County*, 70 Wash. 48, 126 Pac. 54, Ann. Cas. 1914 B 641.

⁶⁸ *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891.

posed by the state, or other public authority, for the purpose of raising revenue upon the enjoyment of a privilege, or the engaging in an occupation or the performance of some other act.⁶⁹ Among such taxes are occupation taxes; franchise taxes; inheritance and succession taxes; sales taxes; taxes on the use of gasoline; automobile license taxes; mortgage registration taxes; inspection fees and such miscellaneous taxes as the Federal tax on tobacco and upon gifts inter vivos not in contemplation of death. Some courts hold an income tax to be a property tax and others hold it to be an excise tax.⁷⁰

§ 361. **Taxes on Income.** An income tax is one based directly on one's income, emoluments and profits, gross or net, or upon a person in accordance with his income, emoluments and profits. It should be distinguished from an ad valorem tax, which is a tax assessed against property at a certain rate upon its value. It should also be distinguished from an excise tax, which was defined in the preceding paragraph.⁷¹

The Federal Income Tax law is constitutional under the provisions of the Sixteenth Amendment.⁷² The Constitutions of a considerable number of states provide for an income tax and income tax laws have been held valid under these provisions.⁷³ In other states such laws have been held valid under the general laws of taxation.⁷⁴ In a few states such a law has been held to be in viola-

⁶⁹ *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748; *Culliton v. Chase*, 174 Wash. 363, 25 P. (2d) 81; *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016; *Pacific Ins. Co. v. Soule*, 74 U. S. 433, 19 L. ed. 95.

⁷⁰ *Ingels v. Riley*, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A. L. R. 1; *Miles v. Department of Treasury (Ind.)*, 193 N. E. 855, 97 A. L. R. 1474, modified 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359.

⁷¹ *Powell v. Gleason*, 50 Ariz. 542, 74 P. (2d) 47, 114 A. L. R. 838; *Miles v. Department of Treasury (Ind.)*, 193 N. E. 855, 97 A. L. R. 1474, modified 209

Ind. 172, 199 N. E. 372, 101 A. L. R. 1474.

⁷² See Chap. 17, § 196, *supra*; *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 81 L. ed. 668, 108 A. L. R. 721.

⁷³ Constitution of Kansas, Art. XI, § 12; Constitution of Oklahoma, Art. X, § 12; Constitution of Colorado, Art. X, § 17; Constitution of Kentucky, § 174; *Diefendorf v. Gallet*, 51 Idaho 619, 10 P. (2d) 307.

⁷⁴ *O'Connell v. State Board of Equalization*, 95 Mont. 91, 25 P. (2d) 114; *Taylor v. Gehner*, 329 Mo. 511, 45 S. W. (2d) 59, 82 A. L. R. 986.

tion of the state Constitution. For example, the Supreme Court of the State of Washington has held an income tax law to be a property tax and in violation of the uniformity clause of the Constitution.⁷⁵ Imposing a progressive tax on incomes does not deny the taxpayer the equal protection of the laws guaranteed by the Federal Constitution. "The Fourteenth Amendment never was intended to lay upon the states an unbending rule of equal taxation," averred Chief Justice Winslow of the Supreme Court of Wisconsin. "The states may make exemptions, levy different rates upon different classes, tax such property as they choose, make such deductions as they choose, and, so long as they obey their own Constitutions and proceed within reasonable limits and general usage, there is no power to say them nay."

The tax may be levied upon the income of residents of a state, upon income received from intrastate activities and also from extrastate activities. It may also be levied upon nonresidents, including foreign corporations, upon income received from activities within the state.⁷⁶

The word "income" has been given a variety of meanings in the different statutes. In general, it means the true increase in the amount of wealth which comes to a person during a stated period of time. It is the gain derived from capital, from labor or from both combined, including profits gained through a sale or conversion of capital assets. It is based on the conception that additional property has come to the taxpayer out of which some contribution should be paid for the support of the government. It imports an actual gain and increase of wealth in hand. It does not comprehend an unrealized increase in the value of capital investments. It does not include a stock dividend declared on stock of the same nature and by which no part of the company's assets are separated from the common corporation funds, or any stock dividend whereby the proportional interest of the stockholder after distribution is not essentially different from his former interest.⁷⁷

⁷⁵ *Culliton v. Chase*, 174 Wash. 363, 25 P. (2d) 81; *Jensen v. Henneford*, 185 Wash. 209, 53 P. (2d) 607.

⁷⁶ *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N. W. 673, L. R. A. 1915 B 569, Ann. Cas. 1913 A 1147; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445; *United States*

Glue Co. v. Town of Oak Creek, 247 U. S. 321, 62 L. ed. 1135, Ann. Cas. 1918 E 748; *Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S. E. (2d) 728, 156 A. L. R. 1360.

⁷⁷ *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521, 9 A. L. R. 1570 (income from property is "a gain, a profit, something of

The Federal income tax laws are administered by the Collector of the Internal Revenue and by the Tax Court of the United States. The taxpayer is required to file a return under a penalty of perjury for misrepresentation and, if the taxpayer receives a salary, the employer is required to deduct a fixed amount of such tax from the salary.⁷⁸ State income taxes are collected through boards or commissions for the state governments and the taxpayer is required to file a return with such board or commission.

§ 362. Succession Taxes. An inheritance or succession tax is an excise or impost laid upon the privilege of receiving property by inheritance. It is a tax on the right or privilege of succession. It may be said to be the price paid to the government in order to inherit the property involved. The courts have held that the government has inherent power to impose such taxes and, in some states, they have been provided for in the state constitutions. The state has plenary power over all property passing by will or by the laws of descent, being limited only by constitutional restrictions.

" . . . The right of one's children or nearest relatives to inherit his estate is probably as nearly a natural right as any other that is not an absolute natural right," declared Chief Justice Harrison of the Supreme Court of New Mexico. "It is certainly a much stronger right than others possess, and yet, should a person possessed of an estate die, though a half dozen dependent minor children survive him . . . they cannot succeed to such estate in the absence of some law defining and protecting their rights and regulating their succession thereto. In the absence of some regulatory law, strangers might by force or otherwise take possession of

exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being derived, that is, received or drawn by the recipient for his separate use, benefit, and disposal"); *Helvering v. Griffiths*, 318 U. S. 371, 87 L. ed. 843; *Helvering v. Sprouse*, 318 U. S. 604, 87 L. ed. 1029, 144 A. L. R. 1335; *Bingham v. Long*, 249 Mass. 79, 144 N. E. 77, 33 A. L. R. 809. See also

Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224; *Sprouse v. Commissioner of Internal Revenue*, 122 F. (2d) 973, 143 A. L. R. 226; *Koshland v. Helvering*, 298 U. S. 441, 80 L. ed. 1268, 105 A. L. R. 756, 761 (stock dividends); *Commissioner of Corporations & Taxation v. Morgan*, 306 Mass. 305, 28 N. E. (2d) 217, 130 A. L. R. 402 (stock dividends).

⁷⁸ See 26 USC Chaps. 34-38. See also note 77, *supra*.

the estate and appropriate it to their own use to the exclusion of the children, or one child might take possession of the entire estate to the exclusion of all the rest. Hence, in order to avoid conditions so manifestly unjust . . . and to avoid disturbance and violation of other laws which would inevitably grow out of such conditions, it is necessary that the more rightful heirs be protected in their rights by the sovereignty itself, and to the extent that sovereign protection is necessary, the power to regulate is inherent. Likewise, if sovereign protection be necessary . . . then the power to raise revenue for the expense of protection is inherent in the sovereignty which affords protection.”⁷⁹ Some authorities hold that the power to levy succession taxes comes from the power to regulate, while others declare that it comes from the power to raise revenue. A few authorities hold that it comes from both powers.⁸⁰

An inheritance tax, being a tax on the right to transmit and to succeed to property, is not subject to the requirements of uniformity and equality contained in various constitutional provisions of several states. The uniformity clause is not applicable except where there is a different rate or measure applied to subjects of the same class. The state, therefore, may select the subjects upon which it chooses to levy the tax, arrange them into classes and may fix the tax to be borne by each subject. There is this limitation, however. The tax is subject to the equal protection clause of the Fourteenth Amendment.⁸¹

The Federal Estate Tax differs from a state inheritance tax. The Federal tax is not an excise upon succession and receipt of benefits under the law or the will of the testator as is true of a state inheritance tax. It is an excise upon the estate at the death of the owner. Because of this difference the Federal tax is usually paid out of the residuum of the estate, while the state inheritance tax is chargeable to the legatees or residuary distributees. “The Federal estate tax . . . ” observed Chief Justice Parsons of the Supreme Court of New Hampshire, “is not a tax upon succession and receipt of benefits under the law or the will. What this law taxes is not the interest to which the legatees and devisees succeeded on

⁷⁹ Re Harkness, 83 Okla. 107, Wash. 579, 49 P. (2d) 480.
204 Pac. 911, 42 A. L. R. 399.

⁸⁰ Re Harkness, 83 Okla. 107, 204 Pac. 911, 42 A. L. R. 399.
⁸¹ Re Harkness, 83 Okla. 107, 204 Pac. 911, 42 A. L. R. 399. See also note 82, *infra*.
re Frothingham's Estate, 183

death, but the interest which ceased by reason of the death. The state tax is imposed upon or measured by the amount passing to each legatee or heir. . . . Whether the Federal tax comes out of the residuum or diminishes pro rata the particular legacies is matter of local law. . . . If there is no will and the estate is divisible among several heirs, the share of each is necessarily depleted pro rata by the tax."⁸² The lien of the Federal estate tax attaches immediately upon the death of the decedent and is superior to all liens imposed by any state law or judicial decision.⁸³

Many questions have arisen over this form of taxation. They relate to the transfer and situs of the property subject to the tax and to its multiple taxation. The decisions, however, of the courts of a majority of the states and of the Federal government establish the general conclusions that (a) Property conveyed in contemplation of death is subject to an inheritance tax.⁸⁴ (b) Transfer upon death of real estate is taxable in the state in which it is located.⁸⁵ (c) Transfer by will or inheritance of tangible personal property is taxable in that state in which it is physically and permanently located.⁸⁶ But there are many legal interests, other than conventional ownership, in both real estate and tangible personal property which, upon death, may be constitutionally subjected to taxation in states other than where they are located. Examples of such interest are mortgages, contracts of purchase or shares of stock in a foreign corporation whose only property is real estate and tangible personal property.⁸⁷ (d) Intangible property, having its situs in the United States, but belonging to a nonresident subject of another nation, is liable under the Federal estate tax law.⁸⁸ (e) The jurisdiction of a state to tax the transfer of intangible personalty,

⁸² *Williams v. State*, 81 N. H. 341, 125 Atl. 661, 39 A. L. R. 490; *Fernandez v. Wiener*, — U. S. —, 90 L. ed. — (entire community estate taxable upon death of husband); *United States v. Rompel*, — U. S. —, 90 L. ed. —.

⁸³ *Detroit Bank v. United States*, 319 U. S. 329, 87 L. ed. 304; *Michigan v. United States*, 317 U. S. 338, 87 L. ed. 312.

⁸⁴ *Pearson v. McGraw*, 308 U. S. 313, 84 L. ed. 293; *Nichols v. Coolidge*, 274 U. S. 531, 71 L. ed.

1184, 52 A. L. R. 1081.

⁸⁵ See §§ 356, 360, *supra*; *Curry v. McCanness*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162.

⁸⁶ See §§ 356, 360, *supra*; *Curry v. McCanness*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162.

⁸⁷ *Curry v. McCanness*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162. See also *Stewart v. Commonwealth of Pennsylvania*, 312 U. S. 649, 85 L. ed. 1101.

⁸⁸ See §§ 357, 360, *supra*; *Curry v. McCanness*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162.

such as securities, notes and bonds, in contemplation of death, is dependent not on the physical location of the property in the state but on control over it. For example, the State of Oregon had power to tax property held in trust in Chicago, the trust having been established in contemplation of death by a resident of Portland, Oregon.⁸⁹ (f) When the owner is domiciled in one state and carries on business in another, intangibles may be subject to a succession tax in the state of his domicile and also in the state of his business, the tax in the second state to be measured by the value of the intangibles used in his business. For example, shares of stock may be taxed at the domicile of the shareholder and also at the domicile of the corporation, which the taxing state has created.⁹⁰ (g) The Fifth and Fourteenth Amendments do not prevent intangibles from being taxed in more than one state.⁹¹

For the purpose of estate and inheritance taxation, the power to dispose of property at death is equivalent of ownership and a transfer of interest in intangibles by exercise of a power of appointment stands on the same footing as their transfer at death. "In both cases," observed Chief Justice Stone, "the sovereign's control over his person and estate at the place of his domicile and his duty to contribute to the financial support of government there afford adequate constitutional basis for the imposition of a tax."⁹²

§ 363. Sales and Compensating Taxes. Sales taxes and compensating taxes are companion excise taxes. The sales tax is collected on each retail sale. The compensating tax is levied and collected from every person for the privilege of using within the state any article of tangible personal property purchased without the state. But the compensating tax does not apply to the use of any article of tangible personal property, the sale or use of which

⁸⁹ *Pearson v. McGraw*, 308 U. S. 313, 84 L. ed. 293. See also *Central Hanover Bank & Trust Co. v. Kelly*, 319 U. S. 94, 87 L. ed. 1282 (trust created in New York by resident of New Jersey).

⁹⁰ *State Tax Commission v. Aldrich*, 316 U. S. 179, 86 L. ed. 1358, 139 A. L. R. 1436. See also *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. ed. 1053, 42 A. L. R. 316; *Re Miller*, 184 Cal. 674, 195 Pac. 413, 16 A. L. R. 694; *Re*

Harkness, 83 Okla. 107, 204 Pac. 911, 42 A. L. R. 399; *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162.

⁹¹ *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162. See note 90, *supra*.

⁹² *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. ed. 1097, 141 A. L. R. 948; *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, 123 A. L. R. 162; *Graves v. Elliott*, 307 U. S. 383, 83 L. ed. 1356.

has already been subjected to a tax equal to or in excess of the sales tax of the state. The purpose of the compensating tax is to subject to taxation property purchased in a foreign state and imported into a state which levies a tax on retail sales affected in that state. In this way it complements the tax on retail sales and prevents purchasers from obtaining goods in a foreign state and importing them in such a manner as to avoid the sales tax.⁹³

Both the sales tax and the compensating tax have been held constitutional and not an interference with interstate commerce. "A tax is denominated a sales tax, although it is paid by the buyer," averred Justice Geraghty of the Supreme Court of Washington. "A sale has been defined as a contract for the transfer of property from one person to another for a valuable consideration, and in every sale two parties are concerned, the buyer and seller. Here the duty of paying the tax is imposed upon the buyer; its collection and transmittal to the state upon the seller. It is within the legitimate power of the legislature to impose the duty of collecting upon the retailer as a reasonable regulation of his business."⁹⁴

Speaking of the compensating tax, Justice Cardozo declared that "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. . . . The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them. Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the off-

⁹³ 9 Rem. Rev. Stats. of Wash. § 8370-16 et seq.; *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. (2d) 14; *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016.

⁹⁴ *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. (2d) 14; *Frazier v. State Tax Commission*, 234 Ala. 353, 175 So. 402, 110 A. L. R. 1479; *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113, 89 A. L. R. 1398; *Continental*

Supply Co. v. People, 54 Wyo. 185, 88 P. (2d) 488; 129 A. L. R. 217; *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 459, 128 A. L. R. 876; *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016. See also *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888, 132 A. L. R. 475 and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373, 85 L. ed. 897.

setting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Everyone who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington. When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. . . . In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local."⁹⁵

A state may impose the tax when property is purchased by a local buyer from a seller outside the state through agencies of interstate commerce such as a mail order business and a foreign corporation doing business in the state through retail stores may be required to act as agent for the state in collecting the tax, even though the local retail branch had no part in soliciting or consummating the sale. If the sales are made through traveling salesmen, the foreign corporation may be required to pay the tax direct. A state cannot impose a sales tax on transactions consummated without the state by residents of the state, but it may hold a non-resident seller of goods in interstate commerce to residents of the state liable for a *use* tax.⁹⁶

The Supreme Court has held that the compensating tax applied to machinery, materials and supplies imported into the State of Washington by the contractors constructing the Grand Coulee Dam, even though the project had been financed by the United States government. It has also held that a state may levy a sales tax on the purchase of materials by a contractor for use in the performance of a cost-plus contract with the United States as well as a use tax on materials purchased in another state for use in performing a cost-plus contract with the United States notwithstanding

⁹⁵ *Henneford v. Silas Mason Co. Inc.*, 300 U. S. 577, 81 L. ed. 814.

⁹⁶ *General Trading Co. v. State Tax Commission*, 322 U. S. 335, 88 L. ed. 1309; *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888, 132 A. L. R. 475. See also *Wisconsin v. J. C. Penney Co.*,

311 U. S. 435, 85 L. ed. 267, 130 A. L. R. 1229; *State Tax Commission v. General Trading Co.*, 233 Iowa 877, 10 N. W. (2d) 659, 153 A. L. R. 602; *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 88 L. ed. 1304 (sales consummated in Tennessee for delivery in Arkansas not subject to sales tax in Arkansas).

ing that the economic burden of the tax is borne by the United States and the title passed to the United States on shipment of the material. But a state cannot levy a sales tax on building materials purchased by a Federal Land Bank to effect necessary repairs and improvements to buildings and fences on property purchased by the bank through foreclosure proceedings as such functions were held to be governmental, Justice Murphy declaring that "When Congress constitutionally creates a corporation through which the Federal government lawfully acts, the activities of such corporation are governmental."⁹⁷ Property, however, brought into the state by agencies engaged in interstate commerce and used indiscriminately in interstate and foreign commerce cannot be taxed, but prohibitory, discriminatory burdens upon interstate commerce must be determined largely from the particular facts of specific cases.⁹⁸

§ 364. Business, Occupation and Other Excise Taxes. Most of the states have enacted statutes levying various forms of excise taxes in addition to succession taxes, income taxes and sales and compensating taxes. These forms of taxation include business and occupation taxes; public utility taxes; admission taxes such as admission to amusements, fairs and other forms of entertainment; liquor taxes; taxes on conveyances; taxes on stock issues and transfers; fuel oil taxes; taxes on cigarettes and tobaccos; taxes on proprietary medicines and toilet preparations; store license taxes and gift taxes, as well as other excise taxes.⁹⁹

These taxes, as a general rule, have been held constitutional by the courts. "The only limitation imposed upon the legislature is that, when it proceeds to impose a tax on occupations or privileges,

⁹⁷ *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 844. See also *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 140 A. L. R. 615; *Curry v. United States*, 314 U. S. 14, 86 L. ed. 9; *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U. S. 95, 86 L. ed. 65.

⁹⁸ *Northern Pac. R. Co. v. Henneford*, 15 F. Supp. 302; *Nelson v. Sears, Roebuck & Co.*, 317

U. S. 359, 85 L. ed. 888, 132 A. L. R. 475; *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249, 77 L. ed. 1155 (taxation of use of gasoline used in interstate commerce held valid as use tax); *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. ed. 673 (use tax applied to gasoline used in interstate commerce).

⁹⁹ *Rem. Rev. Stats. of Wash.* § 8370-1-220.

it must be equal and uniform," asserted Justice Thomas of the Supreme Court of Alabama. "The equality and uniformity consists in the imposition of the like tax upon all who engage in the vocation or who may exercise the privilege taxed."¹⁰⁰ A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the state constitution, as well as the Federal constitution,¹⁰¹ and an excise tax will be held valid when it is not unjustly discriminatory, arbitrary, or otherwise contrary to common right.¹⁰²

¹⁰⁰ Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 110 A. L. R. 1479.

110 A. L. R. 1479.

¹⁰¹ Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402,

¹⁰² Floyd Fruit Co. v. Florida Citrus Commission, 128 Fla. 565, 175 So. 248, 112 A. L. R. 562.

CHAPTER 29

EMINENT DOMAIN

The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner.

—Justice Douglas

§ 365. **Definition.** Eminent domain is generally defined as the right or power of a sovereign state to condemn private property for some particular public use for the purpose of promoting the general welfare and to appropriate the ownership or possession of such property for such use upon paying the owner due compensation. It embraces all cases where, by the authority of the state, the property of the individual is appropriated for the public good without the consent of the owner for the purpose of devoting it to some particular use, either by the state itself or by a corporation, public or private, or by an individual.¹

§ 366. **Nature and Extent of Power.** The power of eminent domain is an attribute of sovereignty and inheres in every independent state. It is founded upon the common necessity and interest of appropriating the property of the individual members of the community to the greater necessities of the whole community. It does not depend upon the existence of any constitutional provision. It is a reserved right vested in the state, subject to the right of the public to demand its use when necessary for the general benefit. In fact, the taking of private property for public use is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state.² This power, like the police power, is inalienable.

¹ Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 21 Wyo. 204, 131 Pac. 43, L. R. A. 1916 C 1275, Ann. Cas. 1915 D 1207; Western Union Tel. Co. v. Louisville & N. R. Co., 270 Ill. 399, 110 N. E. 583, Ann. Cas. 1917 B 670.

² Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518.

It cannot be surrendered and, if attempted to be contracted away, it may be resumed at will. A legislature cannot bind itself or a subsequent legislature not to exercise the power when public necessity or convenience demands it. The same rule applies to any agency to which the power is delegated.³

The power is without limit except for the limitations of the Federal and state constitutions. The Constitution of the United States provides that "nor shall any state deprive any person of . . . property, without due process of law,"⁴ and the constitutions of the several states have provisions similar to that of Indiana, which declares that "no man's property shall be taken by law without just compensation; nor, except in the case of the state, without such compensation first assessed and tendered."⁵ By implication and under the provisions of the Fifth Amendment of the Constitution of the United States there is the further limitation that property cannot be taken for private use.⁶ Subject to these limitations, the state's right of eminent domain, as well as that of the Federal government, extends over every foot of its territory and the same is held by its owners in subordination to that fixed and co-existing right.⁷ The power extends to lands already appropriated to a public use, such as lands used by a railroad, and it also extends to lands owned by another state in its proprietary capacity, in the state in which lands are located.⁸

§ 367. Distinguished from Similar Powers. The power of eminent domain should be distinguished from somewhat similar powers, such as acquiring property for private use; acquiring it

³ *Georgia v. Chattanooga*, 261 U. S. 472, 68 L. ed. 796.

⁴ Fourteenth Amendment, § 1.

⁵ Constitution of Indiana, Art. I, § 21; *Fountain Park Co. v. Hensler*, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518. See also Constitution of Iowa, Art. I, § 18; Constitution of Oregon, Art. I, § 18; Constitution of New Hampshire, Bill of Rights, Art. XII; Constitution of Minnesota, Art. I, § 13; Constitution of Tennessee, Art. I, § 21.

⁶ *Fountain Park Co. v. Hensler*, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518.

⁷ *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781. See also *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405, 79 L. ed. 949; *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U. S. 613, 79 L. ed. 1090.

⁸ *Georgia v. Chattanooga*, 264 U. S. 472, 68 L. ed. 796.

for private ways of necessity; and destruction of property from necessity.

(a) Property for private use cannot be acquired through the exercise of the powers of eminent domain, but only through purchase, gift, or inheritance. What constitutes public as distinguished from private use will be discussed in a later section.⁹

(b) Acquiring property for private ways of necessity through a procedure similar to eminent domain is permitted under the constitutions of several western states. A private way of necessity is defined and includes a right of way across the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, railways, canals, ditches, tunnels, and other improvement for irrigation, sanitary or industrial purposes.¹⁰

(c) The destruction of property from necessity is essentially a private rather than a public right. It is the right of a private individual to take or destroy private property in self-defense or for the protection of life, liberty or property. It may be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals, in defense of their common safety, or in the protection of their common rights. For example, the people of a neighborhood may trespass on the land of another to destroy noxious weeds, or, in a densely populated town, all may unite in destroying a building to stop a conflagration, which threatens destruction of the rest. In thus destroying property each individual acts at his own peril, and only a necessity, extreme, imperative and overwhelming, will constitute a justification for the destruction of the property. Expediency, public good or utility are not sufficient.¹¹

Eminent domain should also be distinguished from the exercise of such governmental powers as the power of taxation, the power of levying local assessments, the police power and the war powers.

(d) Under taxation, the individual is required to make an enforced contribution of money or property as his share of the burden of the support of the government. Property taken under

⁹ See § 369, *infra*.

¹⁰ 7 Rem. Rev. Stat. of Wash. § 6747; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518; State ex

rel. Huntoon v. Superior Court, 148 Wash. 680, 270 Pac. 104.

¹¹ Hale v. Lawrence, 21 N. J. L. (1 Zabriskie) 714, 47 Am. Dec. 190.

eminent domain is so much beyond the owner's share of the burden of government, and for this reason he is entitled to compensation.¹²

(e) Special or local assessments for public improvements are the exercise of the right of taxation, rather than the exercise of the right of eminent domain. Under this power, the governing authority, generally a state or a municipality, has the power to direct that the whole or such part of a public improvement, such as establishing, grading or repairing a street, shall be assessed to the owners whose property is benefited thereby.¹³

(f) The police power regulates the use and enjoyment of property so as to conserve or promote the health, morals, safety and general welfare of the community, while under the power of eminent domain private property is taken directly for the public use.¹⁴

(g) The taking of private property in time of war or impending public danger is the exercise of the police power or the war powers of the government. It may commandeer the products of a manufacturing concern. An army, engaged in military operations, may seize private property, destroy bridges, burn houses, erect fortifications and devastate whole sections of the country. When property is destroyed or damaged in this way, the owner must recover from the government for the value of his property not through eminent domain proceedings, but by establishing his loss in the court of claims.¹⁵

§ 368. Who May Exercise Power. The power of eminent domain is vested in the government of the United States, in the governments of the several states, municipal corporations and political subdivisions, and in corporations and individuals. (a) The

¹² See Chap. 21, §§ 269-271, supra; *People ex rel. Griffin, v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

¹³ *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369.

¹⁴ *Conger v. Pierce County*, 116 Wash. 27, 198 Pac. 377, 18 A. L. R. 393. See also Chap. 27, §§ 329-331; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 67 L. ed.

322, 28 A. L. R. 1321; *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354, 12 A. L. R. 669.

¹⁵ *Roxford Knitting Co. v. Moore & Tierney (C. C. A.)* 265 Fed. 177, 11 A. L. R. 1415; *United States v. Russell*, 13 Wall. 623, 20 L. ed. 474; *George v. Consolidated Lighting Co.*, 87 Vt. 411, 83 Atl. 865, 52 L. R. A. (N. S.) 850, Ann. Cas. 1916.C 416.

government of the United States may exercise the power of eminent domain whenever it is necessary or appropriate to use the power in the execution of any of the powers granted to it by the Constitution. "It is well settled," asserted Justice Gray, "that whenever in the execution of the powers granted to the United States by the Constitution, lands in any state are needed by the United States for a fort, magazine, dockyard, lighthouse, custom-house, postoffice or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the state with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state, as Congress may direct or permit."¹⁶ This right is complete in itself and can neither be enlarged nor diminished by a state.¹⁷ (b) Each state in its sovereign capacity possesses this power and may exercise it for its own public welfare, except as the inhabitants of a neighboring state may be incidentally benefited. "In this respect the several states are distinct and independent of each other," observed Justice Potter of the Supreme Court of Wyoming, "respectively possessing and exercising the power for their own purposes and their own public welfare."¹⁸ (c) Municipalities and other political subdivisions, including counties, road districts and other incorporated districts when the power is delegated to them by the legislature or is contained in a municipal charter.¹⁹ (d) Private corporations and individuals, discharging a public duty or promoting the public convenience, but the Supreme Court has held that the state may

¹⁶ *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510. See also *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. ed. 576; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. ed. 808.

¹⁷ *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, 87 L. ed. 1390.

¹⁸ *Grover Irrigation & Land Co.*

v. Lovella Ditch, Reservoir & Irrigation Co., 21 Wyo. 204, 131 Pac. 43, L. R. A. 1916 C 1275, Ann. Cas. 1915 D 1207.

¹⁹ *Kansas City v. Liebi*, 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295; *Re Third Street*, 177 Minn. 146, 225 N. W. 86, 74 A. L. R. 561; *State v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E 1076; *Connecticut College v. Calvert*, 87 Conn. 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485.

withdraw this power at any time. In some cases the power has been extended to corporations and individuals for uses which were not for the public benefit but which were the subject of eminent domain proceedings such as a right of way for a logging railroad.²⁰

(e) Foreign corporations, when authority has been granted to them by the legislature of the state wherein it proposes to exercise the power. "Certainly if the power of eminent domain cannot be exercised by a foreign corporation, it cannot be exercised by an association of persons who are not incorporated at all," argued Justice Gilbert of the Supreme Court of Georgia. "A corporation is at least an entity under the law of its domicile."²¹

§ 369. Public Use. The Constitution of the United States and the constitutions of the majority of the several states require that property can be taken only for public use.²² What constitutes a public use is largely a question for the legislature, and the courts will not interfere except to inquire whether the legislature could reasonably have considered the use a public one. Generally, the phrase is not limited to business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated in the future. The courts, however, require that the use shall be fixed and definite. It must be one in which the public actually has an interest, and the terms and manner of enjoyment must be within the control of the state. They have said that the use is not public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain.

The following projects have been held to be public uses: Public buildings of the Federal government; property taken under the

²⁰ *Codd v. McGoldrick Lumber Co.*, 48 Idaho 1, 279 Pac. 298, 67 A. L. R. 580; *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S. E. 517, 44 A. L. R. 534; *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 67 L. ed. 1186, *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 50 L. ed. 581, 4 Ann. Cas. 1174; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. ed. 808.

²¹ *Rogers v. Toccoa Power Co.*,

161 Ga. 524, 131 S. E. 517, 44 A. L. R. 534; *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 46 S. E. 422, 100 Am. St. Rep. 174.

²² Constitution, Fifth and Fourteenth Amendments. See also Constitution of New York, Art. I, § 7; Constitution of Vermont, Art. I, § 2; Constitution of Iowa, Art. I, § 18; Constitution of Arkansas, Art. I, § 22.

war powers of the government; buildings of the state, county and municipal governments; libraries; slum clearance projects; buildings for public schools, colleges and universities; public highways; public parks; rights of way; street railways; telephone and telegraph lines; irrigation ditches; drainage sewer and water systems; and many other buildings and projects of public necessity, convenience and welfare.²³

In certain western states the definition of public use has been extended to include public benefit, advantage, or utility and is any use which tends to enlarge the resources, industrial energies, or productive power of a number of the inhabitants of the state or contributes to the welfare and prosperity of the community. Under this extended definition are included takings by a private individual to enable him to cultivate his land or to carry on his business to better advantage, in a community so situated that public sentiment approves of such takings either because they are sanctioned by custom and usage, or because the natural prosperity of the state would be seriously retarded if eminent domain could not be employed for this purpose. The largest number of cases supporting this doctrine have arisen over irrigating the lands of private owners in the states of Arizona, California, Idaho, Montana, New Mexico, Utah, Washington and Wyoming.²⁴

Speaking of the limitations of this extended power, Justice Peckham declared that "Where the use . . . is founded upon . . . some peculiar condition of the soil or climate, or other peculiarity of the state . . . we are always strongly inclined to hold with the state courts, when they uphold a state statute

²³ United States v. New River Colliers Co. 262 U. S. 341, 67 L. ed. 1014; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518; Mull v. Indianapolis & Cincinnati Traction Co., 169 Ind. 214, 81 N. E. 657; Twelfth Street Market Co. v. Philadelphia & R. T. R. Co., 142 Pa. 580, 21 Atl. 989; Bridge Co. v. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186; Nichols v. Central Virginia Power Co., 143 Va. 405, 130 S. E. 764, 44 A. L. R. 727; Hairston v. Danvell & W. R. Co., 208 U. S. 598, 52 L. ed. 637,

13 Ann. Cas. 1008; Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 158, 143 S. W. (2d) 79, 130 A. L. R. 1053.

²⁴ Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 4 Ann. Cas. 1171; Nash v. Clark, 27 Utah 158, 75 Pac. 371, 1 Ann. Cas. 300, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953; Smith v. Cameron, 106 Ore. 1, 210 Pac. 716, 27 A. L. R. 510.

providing for such condemnation. . . . But we do not desire to be understood as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state."²⁵

§ 370. Property Subject to Appropriation. All property located within the state may be taken under the power of eminent domain. This includes real estate and personal property and all interests therein. It includes dwelling houses and other buildings and all property and rights incidental to the land. It includes franchises, water rights, and streams. In general, it may be said to extend to every species of property, and every character of right, title or interest therein, and to every sort of interest a citizen may possess.²⁶

The power extends to property already devoted to a public use. Such property may be subsequently appropriated to a new or different use, provided an estate less than a fee was taken, or a portion of the land less than the whole, or the public use or necessity is superior to the one first attaching. Property of one state located in another state is subject to the power of eminent domain of the state wherein the land is situated.²⁷

The United States may appropriate lands belonging to the states, so long as it does not interfere with the states in the exercise of their proper governmental functions. If the land appropriated is

²⁵ *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 4 Ann. Cas. 1171.

²⁶ *Houston North Shore R. Co. v. Tyrrell*, 128 Tex. 248, 98 S. W. (2d) 786, 108 A. L. R. 1508; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Branson v. Gee*, 25 Ore. 462, 36 Pac. 527, 24 L. R. A. 355; *Galoway v. State*, 139 Tenn. 484, 202 S. W. 76, L. R. A. 1918 D 970; *Pontiac Improvement Co. v. Board of Com'rs of Cleveland Metropolitan Park Dist.*, 104 Ohio St. 447, 135 N. E. 635, 23 A. L. R. 866; *Omnia Commercial Co. v. United States*, 261 U. S. 502, 67 L. ed. 773; *Sanguinetti v. United*

States, 264 U. S. 146, 68 L. ed. 608; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 67 L. ed. 287, *Richards v. Washington Terminal Co.*, 233 U. S. 546, 58 L. ed. 1088, L. R. A. 1915 A 887; *United States v. General Motors Corp.*, 323 U. S. 373, 89 L. ed. 311, 156 A. L. R. 390.

²⁷ *Georgia v. Chattanooga*, 264 U. S. 472, 68 L. ed. 796; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. ed. 576; *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014; *Long Island Water Supply Co. v. City of Brooklyn*, 166 U. S. 685, 41 L. ed. 1165.

used as an instrumentality of the Federal government, it is free of state interference or jurisdiction, but if used by the government in its proprietary capacity the power of the state remains the same as it has over any other land within its borders. "Where, therefore, lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification:" averred Justice Field, "that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits." ²⁸

When the United States acquires land through eminent domain proceedings, the state may qualify its cession by reservations not inconsistent with the governmental uses. For example, the state might reserve the right for the service of civil or criminal process upon the land, or the right to impose a license tax upon a contractor with the United States.²⁹ The state, however, cannot appropriate lands or other property belonging to the United States, although such property is located within the territorial limits of the state. The reason for this rule is that the government of the United States is supreme within its sphere of authority, and no state can interfere with its rights, or embarrass it in their exercise.³⁰

§ 371. Extent of Taking—Necessity. The extent of the property taken and the necessity for the taking are subject to the

²⁸ Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264; James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

²⁹ James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

³⁰ United States v. Gettysburg Electric R. Co., 160 U. S. 668, 40 L. ed. 576; United States v. Chicago, 7 How. 185, 12 L. ed. 660; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. ed. 845; Utah Power & Light Co. v. United States, 243 U. S. 389, 61 L. ed. 791.

determination of the legislature, or to that of some body or person to whom it has delegated the power. Likewise, the occasion for the exercise of the power, the exigency for the occasion, as well as the determination of whether the public welfare justifies its exercise, is also for the legislature. Its determination is conclusive.⁸¹

The legislature, however, has no authority to condemn land in excess of what is required for the present and reasonable future public use. The extent of the power is limited by the necessities of the particular public purpose or use for the land sought to be condemned. The question of whether the taking is unreasonable or whether it constitutes bad faith or is an abuse of power is for the courts. In some states the constitution provides that the question of necessity shall be determined by a jury or other judicial proceeding.⁸²

§ 372. What Constitutes Taking. Taking may be defined as anything done by a state or its delegated agent, which substantially interferes with the beneficial use and ownership of the land, depriving the owner of his lawful dominion over it or any part of it, and not within the general police power of the state. In other words, the property is taken when the owner is deprived of the ordinary, necessary and beneficial use of the property, or its value, or its enjoyment is directly or necessarily diminished by the work in question. It is not necessary that the property should be destroyed or that the owner should be entirely deprived of his estate in order that the owner may be entitled to compensation. There need be no actual entry, but it is sufficient if the owner is deprived of the use of his lands, or the public authority uses other lands acquired by it so that his use or right of enjoyment is impaired, as where water, soil or sewage is deposited upon it or it is damaged by smoke fumes or poisonous gases.

Other examples of taking are lands seized or appropriated by the government actually taking them and their improvements; lands obstructed by a railroad; establishment of a building line; depriva-

⁸¹ *State v. McCook*, 109 Conn. 621, 147 Atl. 126, 64 A. L. R. 1453.

⁸² *Cincinnati v. Vester*, 33 F. (2d) 242, 68 A. L. R. 831; *Joslin Mfg. Co. v. Providence*, 262 U. S.

668, 67 L. ed. 1167; *Kendinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634; *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. ed. 392, L. R. A. 1918 E 190.

tion of ingress or egress to one's home; flooding of owner's lands; laying a pipe through a tract of land; and obstructing the natural flow of surface waters. Even the use of land as an airport may destroy the useful occupation of lands.³³ But mere incidental damage resulting from the legitimate activities of the government or statutes enacted in the promotion of the public welfare do not constitute a taking.³⁴

§ 373. Compensation—Procedure. The payment of compensation for property taken under the right of eminent domain is required by the Constitution of the United States, as well as the constitutions of the several states. The Federal Constitution prohibits the states from depriving any person of his property without due process of law,³⁵ and most state constitutions contain similar provisions.³⁶ "Nor should their lands be taken for such purpose without just compensation," asserted Chief Justice Thayer of the Supreme Court of Oregon. "The constitution . . . guarantees them that, and its provisions should be observed. The reasonable value of the land taken, the ef-

³³ *United States v. General Motors Corp.*, 323 U. S. 373, 89 L. ed. 311; *Fruth v. Board of Affairs*, 75 W. Va. 464, 84 S. E. 105, L. R. A. 1915 C 981; *McCammon & Lang Lumber Co. v. Trinity & B. V. R. Co.*, 104 Tex. 8, 133 S. W. 247, Ann. Cas. 1913 E 870; *United States v. Cress*, 243 U. S. 316, 61 L. ed. 746; *Norwood v. Sheen*, 126 Ohio St. 482, 186 N. E. 102, 87 A. L. R. 1375; *White v. Southern R. Co.*, 142 S. C. 284, 140 S. E. 560, 57 A. L. R. 634; *Milhous v. State Highway Department*, 194 S. C. 33, 8 S. E. (2d) 852, 128 A. L. R. 1186; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *Alabama Power Co. v. Gunterville*, 235 Ala. 136, 177 So. 332, 114 A. L. R. 181; *Rigney v. Chicago*, 102 Ill. 64; *In re Sansom Street*, Philadelphia, 293 Pa. 483, 143 Atl. 134.

³⁴ *Miller v. Board of Public Works*, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479.

³⁵ Fourteenth Amendment, § 1; Constitution of Missouri, Art. I, §§ 20-21; Constitution of Colorado, Art. II, § 15; *United States v. Willow River Power Co.*, 324 U. S. 499, 89 L. ed. 1101. (Fifth Amendment requires compensation for losses for taking of property only. Riparian rights subject to a dominant public interest are not required to be given compensation.)

³⁶ Constitution of Mississippi, Art. I, § 17. For other examples see also Constitution of Rhode Island, Art. I, § 16; Constitution of Maine, Art. I, § 21; Constitution of Oregon, Art. I, § 18; Constitution of North Dakota, Art. I, § 14; Constitution of Idaho, Art. I, § 14; Constitution of Connecticut, Art. I, § 11.

fect of the taking upon the remainder, the manner of the location of the road, the necessity it may occasion for the building or removal of fences, and any other material inconvenience or burden it may create, should be fairly considered, and the sum of the several items should be allowed the owner, subject to any reduction on account of special benefits he may derive therefrom." ³⁷

Neither the due process clauses of the Fifth and Fourteenth Amendments nor the provisions of the state constitutions require any particular form of procedure, except a few states require a jury trial unless waived.³⁸ Their requirements are satisfied if the owner has reasonable notice and a reasonable opportunity to be heard and to present his claim or defense, due regard being given to the nature of the proceeding and the character of the rights which may be affected by it.³⁹ Neither is a uniformity of procedure required. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. For example, condemnation proceedings under a Highway Act may differ from those prescribed for the exercise of eminent domain by a private corporation.⁴⁰

The procedure defined in the statutes of the several states varies, but there is a general uniformity in the requirements as to the assessment of damages and the time and form in which they shall be paid.

(a) *Assessment of Damages.* The requirements as to the assessment of damages are as follows: (1) The assessment is a judicial function, and the damages must be determined by a disinterested, fair and impartial tribunal. The assessment may be made by a judge, a jury, or a board of elected officials.⁴¹ But the due process clause of the Federal Constitution does not guarantee

³⁷ Beckman v. Jackson County, 18 Ore. 283, 22 Pac. 1074. See also Chapman v. City of Hood River, 100 Ore. 43, 196 Pac. 467; Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377, 18 A. L. R. 393; Curry v. Buckhannon & Northern R. Co., 87 W. Va. 548, 105 S. E. 780, 22 A. L. R. 138; Leiper v. Denver, 36 Colo. 110, 10 Ann. Cas. 847.

³⁸ See Constitution of Iowa, Art. I, § 18; Constitution of Mis-

souri, Art. I, § 21; Constitution of Colorado, Art. I, § 15.

³⁹ Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A. L. R. 561.

⁴⁰ Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 68 A. L. R. 434.

⁴¹ Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A. L. R. 561; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563.

either a jury trial or a right of appeal.⁴² (2) If the power is being exercised by the Federal Government, the assessment must be made in a manner conforming to the Constitution of the United States and Acts of Congress.⁴³ (3) The assessment must be made in a manner conforming to the Federal Constitution and the state constitution and statutes, when the power is exercised by the state government, or a municipality or state subdivision, or by one to whom the state has delegated its authority.⁴⁴ (4) The assessment must be at the fair and just value of the property taken, or at a fair and just measure of the depreciation of the property, allowing for direct benefits to other property of the same owner accruing therefrom, when a part only of the tract is taken. If the entire property is taken, the just value would be the fair value of the property in a free market, not what it might bring at a forced sale.⁴⁵

(b) *Payment of Damages.* In some states payment of the damages in advance is required by the state constitution.⁴⁶ When this requirement is not made by the constitution or a statute, payment of compensation may be postponed until after the property is taken when the power has been exercised by the Federal Government, or by a state, municipality or state subdivision, provided adequate provision has been made for the payment of the compensation.⁴⁷ If the appropriation is by a private corporation, the general rule is that payment must be made in advance, or the cor-

⁴² *Dohany v. Rogers*, 28 U. S. 362, 74 L. ed. 904, 68 A. L. R. 434.

⁴³ 40 USC 364-386 (District of Columbia); 43 USC 617 (Boulder Dam); 16 USC 831c (Tennessee Valley Authority); *United States v. New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014.

⁴⁴ *Chapman v. City of Hood River*, 100 Ore. 43, 196 Pac. 467; *Conger v. Pierce Co.*, 116 Wash. 27, 198 Pac. 377, 18 A. L. R. 393.

⁴⁵ *Forest Preserve Dist. v. Caraher*, 299 Ill. 11, 132 N. E. 211; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *United States v. New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014.

⁴⁶ Constitution of Idaho, Art. I, § 14; *Crane v. Harrison*, 40 Idaho 229, 232 Pac. 578, 38 A. L. R. 15; Constitution of Washington, Art. I, § 16; *Fry v. O'Leary*, 141 Wash. 465, 252 Pac. 111, 49 A. L. R. 1249; Constitution of Missouri, Art. I, § 21.

⁴⁷ *Joslin Mfg. Co. v. Providence*, 262 U. S. 668, 67 L. ed. 1167; *Simms v. Dillon*, 119 W. Va. 284, 193 S. E. 331, 113 A. L. R. 787; *Hurley v. Kincaid*, 285 U. S. 95, 76 L. ed. 637; *Haverhill Bridge Proprietors v. County Commissioners*, 103 Mass. 120, 4 Am. Rep. 518; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188; *Bailey v. Anderson*, — U. S. —, 90 L. ed. —.

poration must deposit an adequate sum of money in court or provide satisfactory security before the land is taken.⁴⁸

(c) *Form of Payment.* Full compensation for all damages must be made in money, or secured by a deposit to the owner, irrespective of any benefit for any improvement. If an action is pending, the deposit may be made in court,⁴⁹ but a conditional deposit is not sufficient.⁵⁰

§ 374. Measure of Damages. The constitutions of the great majority of states do not define what just compensation shall be.⁵¹ The Supreme Court of the United States, however, has supplied the definition. "Just compensation . . . requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or a single tract of land, shall be measured by the loss resulting to him from the appropriation," announced Justice Lurton. "Consequently when part only of a parcel of land is taken away . . . the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."⁵²

The same rule exists in the courts of the several states. The measure of just compensation extends to the full amount of the

⁴⁸ Powers v. Bears, 12 Wis. 213, 78 Am. Dec. 733; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Lovett v. West Virginia Central Gas Co., 65 W. Va. 739, 65 S. E. 196.

⁴⁹ Constitution of Washington, Art. I, § 16; Constitution of Colorado, Art. I, § 15; Constitution of Ohio, Art. I, § 19; Rudder v. Limestone County, 220 Ala. 485, 125 So. 670, 68 A. L. R. 776.

⁵⁰ Holmes v. Kansas City, 209 Mo. 513, 108 S. W. 9, 123 Am. St. Rep. 495.

⁵¹ Fourteenth Amendment, § 1;

Constitution of Missouri, Art. I, § 21; Constitution of Maine, Art. I, § 21; Constitution of Arkansas, Art. I, § 22; Constitution of Indiana, Art. I, § 21; Constitution of Rhode Island, Art. I, § 16.

⁵² United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L. R. A. (N. S.) 1135. See also United States v. Welsh, 217 U. S. 333, 54 L. ed. 787; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270; United States v. Chicago, B. & Q. R. Co. (C. C. A.) 82 F. (2d) 131, 106 A. L. R. 942.

land taken and to the extent the remaining lands are diminished in value. Just compensation, therefore, includes the following considerations:

- (a) The value of the land taken.
- (b) Any injury to the remaining tract of land.
- (c) The adaptability of land taken for a special purpose, affecting its value.
- (d) Damages to other lands of the landowner limited to the tract, a portion of which is taken may extend to the recovery for damages to the entire tract.
- (e) The correct way to arrive at the diminution of value to the remaining land of the tract is the market value just before and just after the taking.⁵³
- (f) If the condemnation is for a right of temporary occupancy for a portion of the premises, the compensation would be the market rental value, including depreciation or destruction of permanent equipment consequent upon the taking.⁵⁴

There can be no recovery, however, for indirect or consequential damages, or damages suffered under the exercise of the police powers, or for such damages as are suffered by the public in general. The damages referred to are those which could have been recovered at common-law had the acts been done without constitutional or statutory authority. For example, damages cannot be recovered for fear of danger from the proximity of a high voltage power line or for the loss suffered by a subsequent grant of a franchise to maintain another bridge near the one operated under a prior grant, or for such general damages as may result to nearby residents from the erection of a hospital for contagious diseases upon city property.⁵⁵ The Supreme Court has stated the rule somewhat differently. "The sovereign must pay only for

⁵³ Rudder v. Limestone County, 220 Ala. 485, 125 So. 670, 68 A. L. R. 776; Alabama Cent. R. Co. v. Musgrove, 169 Ala. 424, 53 So. 1009; United States v. Sponenbarger, 308 U. S. 256, 84 L. ed. 240.

⁵⁴ United States v. General Motors Corp., 323 U. S. 373, 89 L. ed. 311, 156 A. L. R. 390.

⁵⁵ Frazier v. Chicago, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A.

306, 78 Am. St. Rep. 296; Dyer v. Tuskaloosa Bridge Co., 2 Porter (Ala.) 296, 27 Am. Dec. 655; Karcher v. Wheeling Electric Co., 94 W. Va. 278, 118 S. E. 154, 30 A. L. R. 1044; Re Hull, 163 Minn. 439, 204 N. W. 534, 49 A. L. R. 320; Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 25, 67 L. ed. 165; Northern Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

what it takes," observed Justice Douglas, "not for opportunities which the owner may lose. . . . The Fifth Amendment allows the owner only the fair market value of the property; it does not guarantee him a return of his investment."⁵⁶

§ 375. Estate and Rights Acquired. The estate and rights acquired under the exercise of the power of eminent domain depends upon the construction of the statute authorizing the taking. In the absence of any constitutional restraint, the legislature may say what interest or estate shall be taken. The whole matter thus being in the discretion of the legislature, it may authorize a fee to be taken, and it may authorize a lesser estate or interest to be taken, according to its views of the requirements of the grantee and the demands of the public good. The only constitutional limitation upon the power is that private property shall not be taken or damaged for public use without just compensation to the owner.

"The grantee takes what the act gives and no more," observed Justice Miller of the Supreme Court of West Virginia. "If the act gives an absolute estate, and compensation is provided on this basis the whole title may be acquired. If it only gives the right to use and occupy, the grantee only takes a conditional fee or easement, terminable on abandonment of the use for which the land was appropriated. The appropriation of land under the power of eminent domain does not give a fee simple estate therein in the absence of express statutory language to that effect, but only the right to use and occupy the land for the purpose for which it is taken."⁵⁷

Although the estates and rights acquired through eminent domain proceedings are governed by the constitution and statutes of each state, there have developed certain rules and doctrines of a general nature which are common to a majority of the states. Among the most important of these one may list the following conclusions announced by the courts: (a) When the extent of the interest to be taken is prescribed by statute, the statute will be strictly construed by the courts.⁵⁸ (b) They will permit no greater

⁵⁶ *United States ex rel. Tennessee Valley Authority v. Powell*, 319 U. S. 266, 87 L. ed. 1390.

⁵⁷ *Hays v. Walnut Creek Oil Co.*, 75 W. Va. 263, 83 S. E. 900, Ann. Cas. 1918 A 802; *United States v. Spontenbarger*, 308 U. S.

256, 84 L. ed. 240.

⁵⁸ *State ex rel. Bremerton Bridge Co. v. Superior Court*, 194 Wash. 7, 76 P. (2d) 990; *Hays v. Walnut Creek Oil Co.*, 75 W. Va. 263, 83 S. E. 900, Ann. Cas. 1918 A 802.

interest or estate to vest than has been expressly authorized or may be necessary for the contemplated public use.⁵⁹ (c) A title in fee cannot be acquired in state or public lands subject to condemnation under the power of eminent domain. But an easement may be acquired. In some jurisdictions, state or public lands are not subject to condemnation under this procedure.⁶⁰

(d) When railroads condemn land for erection of buildings, or other permanent uses, they acquire a title in fee; in acquiring land for rights of way and other less permanent uses, they usually acquire only an easement in the land.⁶¹ (e) Unless the statute provides that a fee shall be taken, the courts have held that an easement only is acquired in rights of way for highways, ditches, canals, levees, transmission lines, sewers, water mains, and other public interests of a similar nature. The fee title remains in the owner.⁶² (f) When land is condemned for a public park, or other use which is continuous or peculiarly exclusive, a fee or an exclusive easement is acquired by the condemnor. In such a case the owner holds the right of reversion in the event the land ceases to be used for the purpose for which it was acquired.⁶³ (g) Upon abandonment or nonuser of land acquired in fee simple absolute, the estate remains in the condemnor. Estates or rights acquired under a fee or right of entry upon breach of conditions, easement or lesser determinable estate, revert to the owner, without any refund of the condemnation money.⁶⁴

⁵⁹ *Seattle v. Faussett*, 123 Wash. 613, 212 Pac. 1085; *Hays v. Walnut Creek Oil Co.*, 75 W. Va. 263, 83 S. E. 900, Ann. Cas. 1918 A 802, 806.

⁶⁰ *State v. District Court*, 42 Mont. 105, 112 Pac. 706; *Nebraska v. Boone County*, 78 Neb. 271, 110 N. W. 629, 15 Ann. Cas. 487.

⁶¹ *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238. But see *Brown v. Title Guaranty & Surety Co.*, 232 Pa. St. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698. See also note 59, *supra*.

⁶² *Excelsior Needle Co. v. Springfield*, 221 Mass. 34, 108 N.

E. 497; *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho 695, 151 Pac. 998. See also note 59, *supra*.

⁶³ *Higginson v. Slattery*, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215; *Miller v. Lincoln Park Com'rs*, 278 Ill. 400, 116 N. E. 178. See also note 59, *supra*.

⁶⁴ *Vandewater v. Chicago, R. I. & P. R. Co.*, 170 Iowa 687, 153 N. W. 190, Ann. Cas. 1917 C 1132; *Lyford v. Laconia*, 75 N. H. 220, 72 Atl. 1085, 139 Am. St. Rep. 680.

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